Joint consumer submission to the review of the Code of Banking Practice and the Review Issues Paper

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Prepared on behalf of consumer advocates by:

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Table of contents

1. About this submission

This submission has been prepared on behalf of Australian consumer advocates by Nicola Howell, Faculty of Law, Queensland University of Technology ('the researcher'), under a consultancy arrangement with the Australian Securities and Investments Commission (ASIC). The researcher has been engaged by ASIC to consult with consumer advocates across Australia in order to prepare a detailed consumer submission to the Review of the Code of Banking Practice and the Review Issues Paper.

Details of the consultation process are set out in the following section.

This submission is endorsed by the following organisations:

- Australian Financial Counselling and Credit Reform Association
- Care Financial Counselling Service and Consumer Law Centre ACT
- CHOICE
- Consumer Action Law Centre
- Consumer Credit Legal Centre NSW
- Consumer Credit Legal Service WA
- Consumers' Federation of Australia
- Financial Counsellors Association of Queensland

Throughout this submission, the following abbreviations are used:

ABA	Australian Bankers Association
ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
BFSO	Banking and Financial Services Ombusdman
CCMC	Code Compliance Monitoring Committee
EDR	External Dispute Resolution
FOS	Financial Ombudsman Service
IP	Review of Code of Banking Practice Issues Paper, May 2008
MFAA	Mortgage and Finance Association of Australia
the Code	Code of Banking Practice
the reviewer	Jan McClelland & Associates Pty Limited

2. Consultation with consumer advocates

This submission has been prepared followed consultation with consumer advocates:

1. A background paper, information about the project, and a short questionnaire were circulated widely to consumer advocates, financial counselors, and consumer representatives through the networks of the Consumers' Federation of Australia, Australian Financial Counselling and Credit Reform Association, and to ASIC's Consumer Advisory Panel. Interested parties were invited to complete the questionnaire and/or contact the researcher directly with their views. Seven advocates completed surveys or provided comments.

   A copy of the consultation documentation is at Appendix A (the background paper, summarising the key points in the Issues Paper, is not included).

2. The researcher directly contacted a number of consumer advocates, known to have direct experience and expertise on banking issues, and invited them to participate in a more detailed interview/discussion on the effectiveness of the Banking Code, and the merits of the interim recommendations. Fourteen consumer advocates participated in a telephone interview/discussion for this submission.

   A copy of the consultation documentation for this part of the project is at Appendix B.

3. A draft submission was circulated to consumer advocates through the Consumers' Federation of Australia network, and further comments and suggestions were invited, and incorporated into the submission. In addition to the individuals who had already participated in project, three additional consumer advocates provided comments on the draft consumer submission.

The research methodology was approved by the Human Research Ethics Committee at Queensland University of Technology, and all data collection has occurred in a manner consistent with the approval.

In total, the researcher received information, comments, suggestions, and/or case studies from 24 individual consumer advocates (from 17 different organisations) including financial counselors, community lawyers, Legal Aid representatives, and consumer representatives. The researcher also spoke with a small number of other individuals with relevant background information on the Code generally, or on specific issues raised in the Code review. Thanks are due to all of those who participated in this project.

In addition to the consultations with consumer advocates, the comments and recommendations in the submission have been informed by:

- early drafts of responses to the Issues Paper from consumer advocates and/or organisations (provided to the researcher by the author(s) of those submissions);

- submissions from consumer advocates to the announcement of the review of the Code of Banking Practice;
- submissions from consumer advocates to other, related reviews and consultations (for example, the consultations on the draft Abacus Code of Practice in late 2007);
- the researcher's own views and experiences with banking issues;[1]
- relevant publications, including the NSW Law Reform Commission's report on guarantees; Bulletins and other publications from the Banking and Financial Services Ombudsman; reports and reviews by the Code Compliance Monitoring Committee; codes in other jurisdictions and sectors (primarily the draft ABACUS Code, the Mortgage and Finance Association of Australia Code, and the UK Banking Code); information from the UK Banking Code Standards Board; and other literature.

3. Evidence-base for change

The terms of reference for the review specifically note that a key consideration for the review should be the need for 'an evidence based approach for amendments to the Code … but having regard to the resource constraints of certain community and consumer group participants'. (IP p 82)

This call for an evidence based approach for consumer policy is not new, and has been recently highlighted by the Productivity Commission's Inquiry into Australia's Consumer Policy Framework.

While consumer advocates welcome the acknowledgement in the terms of reference of the resource constraints of consumer advocates and their organisations, and the opportunities provided by the reviewer for oral consultations, they also would like the reviewer to note the significant resource disparity between consumer advocates and industry representatives, particularly in terms of access to data. Consumer advocates are also disappointed that the industry has not provided any resources to assist consumer organisations engage in the review in detail. Instead, the resources for consultation and engagement with consumer organisations have been provided through ASIC's Consumer Advisory Panel.

By definition, most consumer advocates, financial counsellors, and consumer representatives engage with individuals at a time that they are experiencing difficulties in an ongoing relationship and/or individual transaction with a financial institution. However, while it is often not possible to quantify the extent to which the issues identified by consumer advocates are applicable to banking customers more broadly, it is also often the case that consumer advocates can identify early warning signals for problems that might spread more broadly.

[1] The reviewer has previously worked at the Centre for Credit and Consumer Law (Griffith University), the former Consumer Credit Legal Service Vic, the Consumer Credit Legal Centre (NSW), the former Banking and Financial Services Ombudsman and the Australian Securities and Investments Commission.

The fact that consumer advocates are not in a position to provide quantification of the size or scope of specific problems should not be seen as a reason not to address the concerns raised or adopt the recommendations suggested by consumer advocates.

In addition, it is also important to note that the consumers seen by consumer advocates are likely to be those consumers most at risk from poor or unfair practices. Given that many of these consumers might be considered to be an unattractive customer for banks, widely applicable provisions in the Code can be important as a substitute for competitive drivers for this group or groups of customers.

4. Code membership

The terms of reference for this review note that the reviewer is to report on what barriers, if any, exist to the membership of the Code.

Consumer advocates note that the Code is a voluntary one, but are concerned that there remain a number of banks with retail operations (including ABA member banks) that have not subscribed to the Code. Consumer advocates support the development of strategies to ensure that the Code applies universally to banks with retail operations.

While the number of non-subscribing banks is small when market share is taken into account, there is still a strong view that more can and should be done towards encouraging universal membership.

Non-universal Code membership suggests a level of cross-subsidisation from subscribing banks to non-subscribing banks, with subscribing banks taking on the costs associated with Code membership, while non-subscribing banks reap the potential benefit of any increased public approval of banks arising from the existence of the Code. It is suggested that the existence of the Code, along with other factors, such as the existence and profile of the BFSO (now Financial Ombudsman Service (FOS)) might give banks some reputation advantage over other financial institutions.

In addition, the existence of the Code has been, and continues to be, an effective counter to arguments for greater government regulation of bank conduct in relation to particular issues. Again, non-subscribers are reaping the benefits of less government regulation, without contributing to the costs.

From the perspective of consumers, where there is not universal sign-on to the Code, and non-subscribing banks are acting in a manner inconsistent with the provisions of the Code, then the case for regulation would be stronger. We have no specific evidence of non-subscribers acting inconsistently with the Code provisions. If non-subscribers are complying in practice with the Code provisions, then they should join the Code to ensure that their compliance can be monitored, and that consumers can have confidence in the Code provisions.

It might be suggested that non-subscription to the Code is of less relevance in circumstances where the FOS may apply the standards in the Code as evidence of 'good industry practice'.[2] However, it appears that only a small percentage of matters referred to the former BFSO are investigated; the vast majority are resolved by negotiation between the bank and the consumer.

Consumer advocates are therefore of the strong view that more needs to be done to increase coverage of the Code. Consumer advocates are also somewhat surprised that subscription to the Code is not a condition of ABA membership (for banks with retail operations). This is inconsistent with the approach taken in many other industry codes. For example, the Mortgage and Finance Association of Australia Code is a binding on all full and life members of the MFAA who act for a party in a transaction that involves or may involve the provision of credit.[3]

The ABA should therefore play a greater role in promoting the Code, and the benefits of the Code, to its members, and should require all relevant members to subscribe to the Code. Seeking ASIC approval of the Code might also be a way to promote the Code's benefits to non-member banks.

In the absence of strong sponsorship and promotion of Code membership by the ABA, consumer advocates suggest that there might be a role for the federal government in encouraging banks to subscribe to the Code. For example, in light of the proposed changes to the regulatory environment for consumer credit, there is an opportunity to explore the possibility that membership of an ASIC-approved industry code be a requirement for operating as a deposit-taking institution or credit provider.

Consumer advocates also expressed support for the Code to apply to the finance companies owned by banks as a matter of course, and suggested that this should be made clear in the Code itself.

In the first instance, however, there should be easily accessible information on the banks with retail operations that have not subscribed to the Code. Consumer advocates note that the ABA website includes a list of Code subscribers on its website, and that this list identifies some non-subscribers. However, it is unclear from this list whether other retail banks that are not listed subscribe or do not subscribe to the Code. The CCMC's website contains a list of Code subscribers, but does not include any information on non-subscribers. The information on Code membership could therefore be much more transparent. It is noted that the regular compliance reports on the Banking Code (and other industry codes) that were, until recently, issued by ASIC included a list of Code members, and noted the name(s) of non-subscribing banks.[4] This transparency is important for consumers and for regulators.

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[2] See for example, Financial Ombudsman Service, *Banking and Finance Terms of Reference*, clause 7.1.
[3] *MFAA Code of Practice*, November 2007, clause 4, available at http://www.mfaa.com.au/uploads/MFAA_CodeOfPractice_29.11.07%28V1_21.02.08%29.pdf.
[4] See Australian Securities and Investments Commission, *Compliance with the Payments System Codes of Practice and the EFT Code of Conduct (April 2002 to March 2003)*, December 2003, Report 27, pp 17 and 27 (Table 5).

Consumer advocates recommend the following

1. The ABA should amend its membership rules to ensure subscription to the Code is a requirement of ABA membership for banks with retail operations.

2. The CCMC should include on its website and in other information both a list of Code subscribers and a list of banks with retail operations that do not subscribe to the Code.

3. The ABA should engage in an active strategy to encourage subscription to the Code.

4. The Code clarify that the consumer finance companies that are owned by subscribing banks can, and should, be required to comply with the Code.

5. In the development of proposals to transfer regulation of credit to the national level, the Government should explore the possibility of making membership of an ASIC-approved industry code a requirement for operating as a deposit-taking institution or consumer credit provider.

5. Overall comments on the Code of Banking Practice

As noted in the Issues Paper itself (p 12), consumer advocates agree that, due to the comprehensive review that took place in 2000-2001, the current Code does not need significant amendment. Consumer advocates are generally of the view that the Code, as published in 2004, was a significant advance on the previous Code, and has provided significant benefits to consumers. Consumer advocates also believe that the Code has aided the resolution of disputes, both in the BFSO and in informal negotiations. The Code has been described as an effective 'hook' with which to take intransigent banks to the BFSO. In addition, consumer advocates note that it is a crucial element of the Code's effectiveness that the provisions of the Code are contractually binding.

Financial counsellors and caseworkers in particular noted that particular provisions in the Code can be used to great effect in negotiating with banks on behalf of their clients. In this context, specific reference was made to clauses 25.1 and 25.2, although, as discussed below, some concerns remain about the lack of specificity in these provisions, and not all caseworkers have found it useful to rely heavily on these provisions in their advocacy work.

While consumer advocates believe that the Code was at the high water mark when it was published in 2003/2004, they suggest that it now needs further revision to meet the commitment to continuous improvement and to reposition itself at the high water mark in light of the developments in other parts of the financial services system. There are a number of areas where consumer advocates believe that the Code could further improve standards,

particularly in light of the commitment in the Code to continuous improvement, and the developments in other self regulatory instruments (notably the Abacus Mutuals draft Code (April 2008); the Mortgage and Finance Association of Australia Code of Practice (November 2007); and the revised UK Banking Code (March 2008)). These are detailed further below.

6. Overall response to the review process, the Issues Paper and the interim recommendations

Consumer advocates welcomed the announcement of the Code Review, and, as noted above, also welcomed the opportunity provided by the reviewer to engage in informal consultations at an early stage in the review process, in lieu of written submissions. Consumer advocates also warmly welcome a number of the interim recommendations in the IP, as detailed below.

However, consumer advocates also raised some concerns about the procedural aspects of the review.

First, consumer advocates note that key submissions not been made public, particularly the submission of the Australian Bankers Association (ABA). Consumer advocates understand that the ABA has not yet given the reviewer permission to publish its submission. This is disappointing. While extracts of the submission are included in the IP, the fact that the complete submission is not available makes it difficult to fully engage with, and respond to, the ABA's position.

This problem is magnified where the ABA submission, and consultations with unnamed banks, appear to have been very influential in the review process. The reviewer has made a number of interim recommendations that adopt the suggestions by industry, even through the reviewer has also noted that submissions by, and consultations with, consumer organisations and regulators favoured a different approach. In many parts of the IP, the reasoning that has led the reviewer to prefer one suggestion or submission over another is not explained. There is not a public weighing up of the different arguments. Without knowing the full reasoning behind a particular recommendation, or for not adopting a particular approach suggested by one group of stakeholders, it is more difficult to provide a detailed response, or arguments to support an alternative approach.

Relatedly, consumer advocates note that there does not appear have been a process for recording publicly the key points made in informal consultations with the reviewer. An agreed summary of the discussions with industry and consumer groups would have assisted in transparency.

Second, consumer advocates note that, in a number of places, the reviewer has identified particular issues as important but, rather than engage with those issues in the IP, has instead suggested that the Code refer to policies and processes to be developed by the ABA, in consultation with consumer advocates and others. Consumer advocates understand that this approach was chosen, in part, so as to minimise the risk of changes to the Code becoming outdated or inconsistent with regulatory changes, particularly given the changes likely

following the recent decision to transfer consumer credit regulation to the Commonwealth, and the various regulatory reform projects that might arise out of the Productivity Commission's inquiry into consumer policy.

While consumer advocates acknowledge these concerns and support the use of guidelines in conjunction with the Code in appropriate circumstances (for example, in relation to the guidelines for family law proceedings), they also note the importance of covering key issues in the Code. The Code is the primary self-regulatory instrument for consumer banking matters. Consumer advocates are concerned that separating some matters to be dealt with in guidelines may result in a loss of transparency and accountability for the outcomes. There is also a concern that this suggestion would also make it even more difficult for consumers to access information about their rights.

There is some concern about the extent to which the development of policies and processes will occur in a timely manner, and whether the resulting documents will be sufficiently robust. In addition, consumer advocates note that the point of an independent review is to move decision-making on Code content away from the industry.

There is also a concern that the Banking Consultative Committee might not be the most appropriate forum for these discussions, as it is a forum more for discussion than decision, and has no authority to make decisions that would bind the ABA council or members.

Third, consumer advocates note with concern that a number of interim recommendations appear to water down existing Code provisions, on the basis of arguments by the industry that compliance with the provisions places subscribing banks at a competitive disadvantage. Responses to these specific interim recommendations are provided below.

However, by way of general response, consumer advocates note that one aim of industry self-regulatory instruments, such as the Code, is to provide a point of differentiation for Code subscribers when compared to competitors in the sector.

Having standards in the Code that are higher than those imposed on competitors is an entirely reasonable and expected outcome. Indeed, if the standards imposed on Code subscribers were not distinguishable from those imposed on non-subscribers, consumer advocates would question whether there was any relevance in the Code at all. Consumer advocates also note that ASIC's regulatory guide on code approvals also specifically refers to the possibility, even expectation, that codes 'should offer benefits that exist beyond the protection afforded by law'.[5]

While consumer advocates acknowledge the realities of the competition in the marketplace, they would support mechanisms to encourage other financial institutions to implement similar standards to those that are in the Code, rather than reducing standards to meet those of competitors. The Code should operate as a way to advance the broader law reform that would ensure that similar standards are imposed on all entities in the marketplace. Taken to

[5] Australian Securities and Investments Commission, *Approval of financial services sector codes of practice, Regulatory Guide 183,* para RG183.28.

its logical extension, the ABA's argument would result in a Code that has few, if any, protections that advance the general law.

Consumer advocates also note that it seems that the discussions surrounding the implementation of other self-regulatory instruments (eg the draft Abacus Code), with standards equal to, or greater than, the Code of Banking Practice, have not been accompanied by similar concerns about competitive disadvantage.

As noted earlier, consumer advocates also suggest that, to the extent that the competitors that the banks are concerned about are bank-owned finance companies, a simple solution would be to require that where a subsidiary company of a subscribing bank offers banking services (savings and transaction accounts, consumer credit, etc), the subsidiary must also comply with the Code.

Greater promotion of the Code to consumers, and the higher standards that it imposes on Code subscribers, might also be an appropriate response to competitive pressures. (See below for recommendations on promoting the Code.)

Finally, consumer advocates note that there is some lack of clarity about the review process from here. In particular, given that there are a number of interim recommendations that suggest a general approach, rather than specific Code wording, consumer advocates are keen to have the opportunity to comment on any revised Code following the release of the reviewer's final report and the ABA's consideration of the review recommendations.

7. Responses to individual interim recommendations

These are listed in the order found in the IP.

7.1 Credit Assessment

For consumer advocates, credit assessment and the need to promote responsible lending, are key issues in this Code review. Cases of irresponsible lending remain all too frequent in the caseloads of consumer organisations, despite the implementation of clause 25.1 in the revised Code, and the maladministration jurisdiction developed by the former Banking and Financial Services Ombudsman (BFSO). In addition, the wording of clause 25.1 is considered by some consumer advocates as so vague that it is not necessarily helpful in casework. Greater specification of benchmarks for credit assessment and responsible lending are required.

Response to interim recommendations

Consumer advocates generally support the inclusion of a general principle of responsible lending in the guiding principles for the Code, although there was also a concern that without more detailed guidance (see below), simply inserting this principle will not have much practical impact.

Consumer advocates strongly support the interim recommendation that clause 25.1 be retained as a stand-alone clause.

However, consumer advocates are also of the view that the Code itself should set out more specific guidance on the ways in which the responsible lending principle should be implemented and/or guidance on conduct that amounts to a breach of the responsible lending principle. Consumer advocates note that the revised UK Banking Code and the draft ABACUS Code include more detailed criteria for responsible lending, as do the commitments of some individual banks, especially in relation to unsolicited offers to increase credit card limits.

Consumer advocates see no reason why the development of more detailed guidance in this Code should be addressed outside of this review process, through the development of policies and processes by the ABA, as suggested in the interim recommendation. Indeed they see significant risks in the proposed process, including a reduction in transparency and accountability, and the likelihood of even further delays in addressing this issue, despite the clear evidence of unmanageable credit commitments in many households. Rather than referring these issues for further discussion, consumer advocates are of the view that this review can and should provide the opportunity for the banking sector to take the lead in this area, particularly in light of the changing economic environment.

The key issue for consumer advocates is that the Code require banks to take reasonable steps to ensure that (i) the product meets the needs of the customer, and (ii) the customer has the capacity to repay the loan without hardship. The focus in this discussion needs to be on the consumer. The customer's needs cannot be understood without reference to the customer's current circumstances. Credit and behavioural scoring might be effective for managing the banks' risks. However, if there is no reference to an individual consumer's actual capacity to pay at the time of making the loan, or increasing the credit limit, then it is not effective in protecting the interests of that consumer.

As noted above, other sectors of the consumer credit industry appear to have accepted that they have an obligation to lend responsibly, and are able to articulate at some level what this means.

For example, the MFAA Code of Practice provides that:

> A member must suggest or recommend to an applicant only those arrangements for finance that the Member genuinely and reasonably believes are appropriate to the needs of that applicant *after undertaking an assessment of the applicant's capacity to repay the loan.* (clause 21A) (emphasis added)

The draft Abacus Mutuals Code provides that:

> 6.1 We will always act as responsible lenders. We will base our lending decisions, including decisions to extend existing credit facilities, on a careful and prudent assessment of your financial position. We will periodically review our credit assessment procedures and criteria for the products we issue.

> 6.2 We will generally only lend amounts to you that we believe, on the information available to us, you can reasonably afford to repay. However, different criteria will apply in the case of some products …

The exposure draft Finance Broking Bill 2007[6] legislation provides that:

> A finance broker must not enter into a finance broking agreement, or agree to any variation of a finance broking agreement, unless the broker has ascertained that the consumer has the capacity to repay credit of the type and amount specified in the agreement, or the agreement as so varied, as the case may be. (s 34(3))

The legislation also spells out the information that must be considered in order to establish capacity to repay, in section 33:

> (4) The matters to be established in relation to a consumer's capacity to repay credit are:
> (a) the consumer's current income and expenditure, and
> (b) the maximum amount the consumer is likely to have to pay under the credit contract for the credit, and
> (c) the extent to which any existing credit contracts are to be repaid, in full or in part, from the credit advanced, and
> (d) the consumer's credit history, including any existing or previous defaults by the consumer in making payments under a credit contract, and
> (e) the consumer's future prospects, including any significant change in the consumer's financial circumstances that is reasonably foreseeable (such as a change in the amount the consumer has to pay under the credit contract for the credit or under any other credit contract to which the consumer is party), and
> (f) any other matters prescribed by the regulations.
>
> (5) A consumer has the capacity to repay credit of a particular type and amount if, and only if, it is reasonably certain that the consumer will, without undue hardship, be able to meet his or her obligations under a credit contract for credit of that type and amount.

The Bill also provides for verification of capacity to repay:

> Section 33(3) A consumer's capacity to repay credit of the type and amount that meets the consumer's credit requirements:
>
> …
>
> (b) is to be verified by such inspection of documentation and inquiry of third parties (other than any third party with whom the finance broker has a business relationship) as is appropriate in the context of the consumer's financial circumstances.

And the ACT Fair Trading Act (s 28A) requires credit providers to carry out a 'satisfactory assessment process' when entering into a continuing credit contract, or increasing the amount of credit available under a continuing credit contract. A 'satisfactory assessment process' is defined as follows:

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[6] Available at http://www.fairtrading.nsw.gov.au/pdfs/About_us/nationalfinancebrokingscheme.pdf.

> (3) For this section, a ***satisfactory assessment process*** , in relation to a debtor, is an assessment of the debtor's financial situation sufficient to satisfy a diligent and prudent credit provider that the debtor has a reasonable ability to repay the amount of credit provided or to be provided.
>
> (4) Without limiting subsection (3), an assessment process is a ***satisfactory assessment process*** only if the credit provider—
>
> (a) asks the debtor for a statement of the debtor's financial situation, including—
>
> (i) income; and
>
> (ii) all credit accounts and applicable limits and balances; and
>
> (iii) repayment commitments; and
>
> (b) takes the statement into account in making the assessment.

While none of these formulations are perfect, their greater specificity gives consumers able to rely on these provisions much greater protection than under either the current Banking Code or the interim recommendation.

Consumer advocates also note that there is a very clear message from the EDR schemes that lenders must make an adequate assessment of capacity to repay, and that relying simply on credit and behavioural scoring will rarely (if ever) be sufficient. For example, in its submission to the draft Abacus Code, the Credit Union Dispute Resolution Centre notes:

> Our experience with maladministration disputes shows that payment history is not always a reliable indicator of capacity to meet repayments on an increased credit limit. In our view, failure to make enquiry of the cardholder to reveal current income levels and other credit commitments may lead to an inappropriate offer of credit despite a member or customer being otherwise able to meet their repayments. We suggest that a training manual to accompany the Code include information about the limitations of 'credit scoring' (or making decisions about a customer's capacity to make repayments without making direct enquiry of their current circumstances) to ensure that Code subscribers don't believe that merely complying with the requirements of clause 5.3 is sufficient to meet their obligations as a lender.[7]

Recent cases litigated under the *Contracts Review Act* and s70(2)(l) of the *Consumer Credit Code* also highlight the importance of adequate assessments of capacity to pay.[8]

There is a genuine concern held by consumer groups about the current practices of credit assessment, and this concern has been responded to by other parts of the financial services sector. It would seem to be a somewhat perverse outcome if the FOS could make individual determinations that a bank has engaged in maladministration because of a failure to properly assess capacity to repay, but that the Code cannot be amended to ensure a systemic approach along similar lines by banks. Similarly, it would seem an odd result if stricter capacity to pay assessment processes are imposed upon finance brokers than on the credit providers to whom they direct their business.

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[7] Credit Union Dispute Resolution Centre, undated, *Draft Code of Practice – Mutual building societies and credit unions, Submission by the Credit Union dispute resolution Centre*, p. 6-7.

[8] For example, *Permanent Mortgages v Cook* [2006] NSWSC 1104 (24 October 2006).

Consumer advocates are therefore strongly in favour of an amendment to the Code that gives greater clarity to the responsible lending commitment.

In relation to unsolicited offers to increase credit card limits, consumer advocates believe that making unsolicited offers in this way at all is inconsistent with a framework that is based on assessing, and responding to, the actual product needs of customers. However, at a minimum, consumer advocates would favour an amendment to the Code that places greater obligations on banks in relation to unsolicited offers.

Consumer advocates suggest an amendment to the Code that is partially based on the Abacus Code, clauses 6 and 7, and partially based on the draft Finance Brokers legislation. The Code should include obligations along the following lines:

Responsible lending

a. We will always act as responsible lenders. We will base our lending decisions, including decisions to extend existing credit facilities, on a careful and prudent assessment of your financial position. We will periodically review our credit assessment procedures and criteria for the products we issue. We will undertake reasonable independent checks to supplement the information that you provide.

b. We will only lend amounts to you that we reasonably believe, on the information available to us, you can reasonably afford to repay, having regard to your financial position at the time of your application for credit, or for an extension of credit.

c. In assessing what you can reasonably afford to repay, we will have regard to the following factors:

(a) your current income and expenditure,
(b) the maximum amount you are likely to have to pay under the credit contract for the credit, and
(c) the extent to which any existing credit contracts are to be repaid, in full or in part, from the credit advanced, and
(d) your credit history, including any existing or previous defaults by you in making payments under a credit contract, and
(e) your future prospects, including any significant change in your financial circumstances that is reasonably foreseeable (such as a change in the amount that you have to pay under the credit contract for the credit or under any other credit contract to which you are a party).

d. We will not rely solely on a prospective borrower's declaration of income to assess capacity to repay, and will seek other information and/or verification of income, where it is reasonably available, before making a decision on the application.

e. We will assess your ability to repay without having regard to the value of the security, unless you clearly advise us that it is your intention to repay the loan by selling the security.

f. Different criteria may apply in the case of bridging finance arrangements and reverse mortgage loans (if we offer these). However, we will still act as responsible lenders, in relation to these products, and base our decision on a careful and prudent assessment of your financial position.

g. We will promote the responsible use of credit to our customers using a range of approaches.

Credit limit increase offers

a. If we issue a credit card or other revolving credit facility, we will act responsibly in setting and increasing the amount of credit we make available to you. We will not send you an unsolicited offer to increase your credit limit if you have a recent poor repayment history, or you have frequently made only minimum repayments, or we are aware, or should have been aware, of other circumstances that would result in you being unable to meet your obligations, or unable to meet your obligations without unreasonable hardship, in relation to the facility as varied.

b. We will ensure any unsolicited offer we make to you to increase your credit limit on a credit card or other revolving credit facility that we issue includes information on:

- The new minimum payment required.
- how long it will take to repay the credit if the new limit is fully utilised, and only the minimum repayments are made;
- Options for lowering existing or new credit limits.
- Not accepting the offer if you cannot afford further credit, you are currently having difficulties meeting your
- repayments, or your financial circumstances are likely to deteriorate in the near future, and
- How to tell us if you do not wish to receive offers to increase your credit limit in the future.

c. If at any time you would like to increase the credit limit on a facility, you can make an application to us, and this will be assessed in accordance with clause x [the responsible lending clause].

Consumer advocates also note that the implementation of so-called 'positive credit reporting' has been mooted as a mechanism for improving credit assessment, and increasing the incidence of responsible lending. However, consumer advocates have significant concerns about these proposals; these have been expressed in more detail in submissions to the Australian Law Reform Commission's current review of the *Privacy Act 1988* (Cth).[9]

Consumer advocates also note that a credit reporting system does not replace the need for a credit provider to engage with an applicant's current financial position. Consumer advocates also note that the expansion of credit reporting would entail further intrusions into financial privacy, and there are significant potential risks with a system that allows private companies to store large amounts of information about an individual's credit history.

The ALRC's Discussion Paper proposes the introduction of a system of 'more comprehensive credit reporting'.[10] However, it also notes that :

> More fundamentally, any credit reporting system is only one tool, albeit an important one, used by lenders to assess risk and to determine lending practices. This tool can be used in different ways, which may depend on other factors including, for example, a particular credit provider's competitive position in the market. The information available through the credit reporting system ultimately cannot dictate what lending practices will emerge or prevail in the marketplace.[11]

[9] See http://www.alrc.gov.au/inquiries/current/privacy/index.htm.
[10] Australian Law Reform Commission, R*eview of Australia's Privacy Law,* Discussion Paper 72, 2007, at p 1444.
[11] Australian Law Reform Commission, *Review of Australia's Privacy Law,* Discussion Paper 72, 2007, at p 1441.

Consumer advocates are firmly of the view that any expansion of the credit reporting system needs to be approached with caution, and with a view to financial privacy concerns. Relevant to this review, any proposal to expand the credit reporting system does not obviate the urgent need for greater specificity on responsible lending in the Code.

Consumer advocates recommend

6. That clause 25.1 be retained as a stand alone clause in the Code (and separated from the current clause 25.2).

7. That a principle of responsible lending be introduced into the key commitments in the Code.

8. That the Code include the following provisions in the stand alone responsible lending / credit assessment clause:

Responsible lending

a. We will always act as responsible lenders. We will base our lending decisions, including decisions to extend existing credit facilities, on a careful and prudent assessment of your financial position. We will periodically review our credit assessment procedures and criteria for the products we issue. We will undertake reasonable independent checks to supplement the information that you provide.

b. We will only lend amounts to you that we reasonably believe, on the information available to us, you can reasonably afford to repay, having regard to your financial position at the time of your application for credit, or for an extension of credit.

c. In assessing what you can reasonably afford to repay, we will have regard to the following factors:

(i) your current income and expenditure,
(ii) the maximum amount you are likely to have to pay under the credit contract for the credit, and
(iii) the extent to which any existing credit contracts are to be repaid, in full or in part, from the credit advanced, and
(iv) your credit history, including any existing or previous defaults by you in making payments under a credit contract, and
(v) your future prospects, including any significant change in your financial circumstances that is reasonably foreseeable (such as a change in the amount that you have to pay under the credit contract for the credit or under any other credit contract to which you are a party).

d. We will not rely solely on a prospective borrower's declaration of income to assess capacity to repay, and will seek other information and/or verification of income, where it is reasonably available, before making a decision on the application.

e. We will assess your ability to repay without having regard to the value of the security, unless you clearly advise us that it is your intention to repay the loan by selling the security.

f. Different criteria may apply in the case of bridging finance arrangements and reverse mortgage loans (if we offer these). However, we will still act as responsible lenders, in relation to these products, and base our decision on a careful and prudent assessment of your financial position.

g. We will promote the responsible use of credit to our customers using a range of approaches.

Credit limit increase offers

a. If we issue a credit card or other revolving credit facility, we will act responsibly in setting and increasing the amount of credit we make available to you. We will not send you an unsolicited offer to increase your credit limit if you have a recent poor repayment history, or you have frequently made only minimum repayments, or we are aware, or should have been aware, of other circumstances that would result in you being unable to meet your obligations, or unable to meet your obligations without unreasonable hardship, in relation to the facility as varied.

b. We will ensure any unsolicited offer we make to you to increase your credit limit on a credit card or other revolving credit facility that we issue includes information on:

- The new minimum payment required.
- How long it will take to repay the credit if the new limit is fully utilised, and only the minimum repayments are made;
- Options for lowering existing or new credit limits.
- Not accepting the offer if you cannot afford further credit, you are currently having difficulties meeting your
repayments, or your financial circumstances are likely to deteriorate in the near future, and
- How to tell us if you do not wish to receive offers to increase your credit limit in the future.

c. If at any time you would like to increase the credit limit on a facility, you can make an application to us, and this will be assessed in accordance with clause x [the responsible lending clause].

7.2 Financial hardship

As noted in the IP, issues of financial hardship, and the subscribing banks' responses to hardship, are one of the key concerns of consumer advocates. Consumer advocates note that there has, overall, been a strong commitment to clause 25.2, and this is also reflected in the

CCMC's review of compliance with this clause.[12] Consumer advocates note that there are many excellent examples of banks implementing clause 25.2 in an effective manner, and improving their practices and processes to the benefit of consumers. This is particularly the case in banks that have instituted a dedicated hardship team. Consumer advocates also note the work that has been initiated following the stakeholder forum hosted by the ABA on 2 May.

However, despite the effective outcomes in many cases, consumer advocates continue to report significant issues with the process of implementing clause 25.2, including poor communication, difficulties in getting referred to the correct person within the bank; lack of timeliness, issues with client authorities, contacting client directly after being notified that a financial counsellor is acting for them; failure to confirm agreements in writing, unrealistic expectations about repayment plans, a lack of clarity about what happens at the conclusion of a repayment plan, and a punitive attitude towards consumers in hardship, particularly evidenced when consumers are referred to the collections area, rather than the hardship area of a bank.

Consumer advocates also note that information about rights under the *Consumer Credit Code* (ss 66, 68) is not always volunteered by bank staff. Nor is information about the hardship provisions in the Code necessarily easily accessible.

In fact, consumer advocates suggest that consumers often have little or no awareness of their options and rights when in financial difficulty. It is in the interests of consumers to act early in relation to financial difficulties, and greater awareness of the options can facilitate early engagement with the difficulties. Consumer advocates are of the view that banks need to do more to ensure that consumers are aware of their options, and of the banks' hardship programs, particularly in the current difficult economic climate.

It is also suggested that the current clause 25.2 is effectively not more than the obligations of banks under section 66 of the Consumer Credit Code and its interpretation by the more progressive EDR schemes.[13] There is therefore scope to enhance the clause. Consumer advocates note that the draft ABACUS Code includes significantly more detail in relation to financial difficulties than exists in the Banking Code. In addition, considerable progress has been made on financial hardship issues in other sectors in recent years, notably the energy sector.

Response to interim recommendations

Consumer advocates support the interim recommendation that clause 25.2 be retained as a stand alone clause with a heading such as 'Customers experiencing financial difficulties'.

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[12] Code Compliance Monitoring Committee, *Inquiry into bank compliance with clause 25.2 of the Code,* December 2005, at http://www.codecompliance.org/pdf/pdfinquiryreport.pdf.

[13] See for example, Credit Ombudsman Service Limited, *Guidelines to the rules of the Credit Ombudsman Service,* Section 16: Financial Hardship, at http://www.creditombudsman.com.au/asset/COSL%2520Guidelines%25203rd%2520Edition%2520Final_November%25202007.pdf.

Consumer advocates warmly welcome the formal recognition of the role of financial counselors in the Code, as suggested by the interim recommendation that clause 25.2 includes reference to working with customers and their financial counselor or representative in developing repayment plan. However, consumer advocates note that many financial counselling services in Australia have long waiting lists, and it may not always be possible for an individual consumer to access a financial counselling service within a particular time horizon. There should not be an implicit or explicit requirement that consumers seeking to access hardship assistance within a bank be also working with a financial counselor. Banks should ensure that they have staff who can work directly with a consumer to develop options that will assist the consumer.

In addition, consumer advocates note that a repayment plan might not be the only outcome of hardship discussions, and it would be unnecessarily restrictive to reference this as the only option in the proposed change.

This highlights another concern of consumer advocates – that banks too often apply a 'one-size fits all' approach, when the circumstances of individual consumers demand specific consideration. Particular reference has been made to the practice of banks almost unilaterally offering a 3 month moratorium in response to a hardship request. Whilst this approach might be suitable in many cases, it will not be appropriate in all cases, particularly those cases where the financial difficulties are of a longer-term nature, and an expectation that normal repayments will recommence following the 3 months is unrealistic.

In relation to the interim recommendation that clause 25.3 include a reference and pointer to protocols for identifying and managing customers in financial difficulty, consumer advocates reiterate their concerns about diverting key Code issues for resolution through another forum. Consumer advocates are of the view that this issue should be addressed squarely in the Code itself.

Consumer advocates note that the broad language of clause 25.2 has allowed for flexibility and innovation by Code subscribers in addressing issues of financial hardship, it is now appropriate to supplement the broad principle with some more specific conduct rules. Again, the draft Abacus Code and the MFAA Code provide a useful starting point. The BFSO Bulletins also provide some guidance.

The Code should include, in an expanded clause 25.2, provisions along the lines of the following:

- we will provide you with information in writing about our processes for dealing with consumers in financial difficulty, including relevant contact numbers, when we send you a default notice;
- We will have information about our hardship processes available on our website and in other publications;
- we will genuinely consider your application or request, taking account of your individual situation;
- we will consider whether your financial difficulties are of a long-term or short-term nature, and suggest any options that are consistent with this assessment;

- we will work with you, and your financial counsellor or other representative if you have one, in developing options to assist you;
- we will confirm in writing any arrangement that is made with you;
- if we decline a financial difficulty application we will provide you with written
- reasons;
- if the provisions of the UCCC could apply to your circumstances, we will advise you that we consider the contract to be regulated by the UCCC, and will explain the hardship variation provisions in the UCCC and how to go about seeking a variation with the bank;
- we will not impose any default fees once you have made a hardship application or request, and that application or request has not been determined;
- if you have made a hardship application or request, we will not commence any enforcement action in relation to a debt that is the subject of the application or request; or assign a debt that is the subject of an application or request. If we have commenced enforcement action before you made an application or request, we will not proceed to judgment whilst we are considering your application or request.

In addition, the Code should ensure that relevant staff (including collections staff) are trained in the financial hardship provisions of the Code, and in the identification of customers in financial difficulty.

There would also be scope for further guidance and best practice examples to be developed by the ABA and banks, in consultation with consumer groups and the Consultative Committee. However, this process should not be used as an alternative to providing at least some more specific detail in the Code.

In relation to the question of communication more broadly, consumer advocates have made specific suggestions for Code amendment. These are detailed below. If adopted and complied with, these provisions would have a significant positive impact on the progress and outcome of financial hardship cases.

Consumer advocates recommend

9. That the Code provisions on financial difficulty should include provisions along the lines of the following:

- We will provide you with information in writing about our processes for dealing with consumers in financial difficulty, including relevant contact numbers, when we send you a default notice;
- We will have information about our hardship processes available on our website and in other publications;
- we will genuinely consider your application or request, taking account of your individual situation;
- we will consider whether your financial difficulties are of a long-term or short-term nature, and suggest any options that are consistent with this assessment;

- We will work with you, and your financial counsellor or other representative if you have one, in developing options to assist you;
- We will confirm in writing any arrangement that is made with you;
- If we decline a financial difficulty application we will provide you with written reasons;
- If the provisions of the UCCC could apply to your circumstances, we will advise you that we consider the contract to be regulated by the UCCC, and will explain the hardship variation provisions in the UCCC and how to go about seeking a variation with the bank;
- We will not impose any default fees once you have made a hardship application or request, and that application or request has not been determined;
- If you have made a hardship application or request, we will not commence any enforcement action in relation to a debt that is the subject of the application or request; or assign a debt that is the subject of an application or request. If we have commence enforcement action before you made an application or request, we will not proceed to judgment whilst we are considering your application or request.

10. That the Code require that relevant staff (including collections staff) are trained in the financial hardship provisions of the Code, and in the identification of customers in financial difficulty.

7.3 Debt collection

Debt collection is also an important part of the Code for consumer advocates, and consumer advocates believe that compliance with the ACCC/ASIC guidelines should be a requirement for all parties involved in collecting consumer debts owed to a Code subscriber.

Response to interim recommendations

Consumer advocates strongly support the interim recommendation to ensure that the reference to the ACCC/ASIC Guidelines is to those guidelines as amended from time to time. Consumer advocates also support relocating this clause to be closer to the financial difficulties clause. Consumer advocates also support consideration of any specific issues for isolated and indigenous consumers in the review of the debt collection provisions of the Code.

However, as noted above, consumer advocates are concerned about the interim recommendation that further guidelines be developed by the ABA. The ACCC/ASIC guidelines provide significant guidance on conduct of debt collectors, and additional matters should be included in the Code, rather than in guidelines. In particular, the Code should include provisions along the following lines:

- We will ensure that our agents comply with the debt collection guideline, and will monitor their compliance with the guideline. If you have a complaint about the conduct of our agents, you can refer it to our IDR and EDR processes.

- If we sell a debt to a third party, we will make it a condition of the sale or assignment that the purchaser complies with the Code in general, and specifically complies with the debt collection guidelines. We will monitor Code compliance by the debt purchasers or assignees that we use.
- We will not sell or assign a consumer debt to a third party unless that third party is a member of an ASIC approved EDR scheme.
- If we refer a matter to our solicitors, we will not pass the solicitors' costs on to you.
- If you have a complaint about our conduct in relation to a debt that has subsequently been sold or assigned, we will seek to 'repurchase' the debt from the assignee, and you can refer your complaint to our IDR and EDR processes.

Consumer advocates are of the view that the Code should make it absolutely clear that the provisions of the Code (including the commitment to act consistently with the ACCC/ASIC guidelines) continue to apply if a consumer debt is assigned to a third party. Consumer advocates note the ABA's comment that this concern is already covered by legislation (IP p 36). However, research by consumer advocates suggests that this is not correct. The matter therefore needs to be codified in order to put the issue beyond doubt. In any case, if the ABA's point is correct, then there can be no objection to clarifying this position in the Code itself.

Consumer advocates recommend

11. That the Code include provisions along the following lines:

- We will ensure that our agents comply with the debt collection guideline, and will monitor their compliance with the guideline. If you have a complaint about the conduct of our agents, you can refer it to our IDR and EDR processes.
- If we sell a debt to a third party, we will make it a condition of the sale or assignment that the purchaser complies with the Code in general, and specifically complies with the debt collection guidelines. We will monitor Code compliance by the debt purchasers or assignees that we use.
- We will not sell or assign a consumer debt to a third party unless that third party is a member of an ASIC approved EDR scheme.
- If we refer a matter to our solicitors, we will not pass the solicitors' costs on to you.
- If you have a complaint about our conduct in relation to a debt that has subsequently been sold or assigned, we will seek to 'repurchase' the debt from the assignee, and you can refer your complaint to our IDR and EDR processes.

7.4 Provisions relating to guarantees

In principle, consumer advocates strongly oppose any watering down of the current provisions relating to guarantees. Consumer advocates note that the guarantee provisions are designed to protect the guarantor, who has no financial interest in the transaction. The fact that the borrower might feel that the obligations associated with the guarantee provisions cause undue delays, or otherwise adversely affect the efficiency of the transaction from the borrower's point of view, should not be the main consideration in the review.

As noted in the IP, the guarantee provisions were the subject of considerable discussion at the time of the last review of the Code, and consumer advocates are wary of the suggestions that they need to be watered down because of competition from other lenders, who are not bound by similar requirements.

In this regard, consumer advocates suggest that some of the problems referred to by the ABA could be overcome if the bank-owned finance companies were automatically subscribed to the Code when their bank subscribed to the Code (see above).

Consumer advocates also point to the 2006 report on guarantors released by the NSW Law Reform Commission.[14] This report refers extensively to the Banking Code provisions on guarantees, and suggests that the Code has been 'at the vanguard' of developing protections for guarantors over the past decade (p 82). The report specifically notes that the general law lags behind the Code of Banking Practice, and that most of the finance industry fails to live up to the standards prescribed in the Banking Code (p 70). It suggests that 'from the banks' point of view, the substance of the Banking Code obviously represents an acceptable accommodation of the interests of guarantors' (p 70).

The NSW LRC also refers to concerns that the guarantee provisions might be unduly burdensome in the case of commercial transactions where the prospective guarantor has some involvement in the business of the borrower. However, the Commission explicitly did not recommend exempting anyone other than a sole director guarantor from the guarantee protections.

The Commission noted the results of empirical research conducted for the Commission; this found that only 16% of director guarantors were 'active' directors (p 95). In addition, the Commission explained that it was unable to think of an exception that could be sufficiently precise, for example, one limited to 'active' guarantors, to avoid injustice to the vulnerable director guarantors identified in the empirical research. (p 96)

The Commission was also 'not persuaded that the administrative inconvenience and cost of disclosure outweigh the fairness of enlightening the prospective guarantor as to the financial circumstances of the borrower'. (p 118)

The guarantee provisions in the Banking Code are largely replicated in the Model Law suggested by the NSW Law Reform Commission.

[14] NSW Law Reform Commission, *Guaranteeing someone else's debts*, Report 107, 2006.

Response to interim recommendations

(i) Waiting period

Consumer advocates are concerned about the proposal to enable the guarantor to waive the 24 hour waiting period. Consumer advocates are of the view that the cooling off period provides a minimum protection for prospective guarantors, and note that a prospective guarantor who is at risk of being unduly influenced by a borrower in signing a guarantee may also be unduly influenced by the borrower to sign the waiver of the waiting period. Consumer advocates note that the Code does not currently require a guarantee and related documents to be signed in the presence of the bank, and that there is therefore some potential for undue influence or unfair pressure to be placed on the guarantor by the borrower or another person involved in the transaction.

Consumer advocates also note that the NSW Law Reform Commission recommends a 24 hour waiting period (p 138).

Consumer advocates therefore do not support the interim recommendation that a guarantor be able to waive the waiting period.

(ii) Commercial asset financing

In principle, consumer advocates are opposed to the inclusion of exceptions in the guarantee provisions.

Consumer advocates note the concerns raised by the NSW LRC about the difficulty of designing an exception that would sufficiently protect vulnerable guarantors in commercial transactions. Consumer advocates are concerned that the interim recommendation to exempt 'related guarantors' from the guarantee provisions suffers from the same problem. In particular, consumer advocates are concerned that the proposed definition of related guarantors is too wide, and risks catching prospective guarantors who, in practice, have no real involvement in the borrower's financial position, and who may be vulnerable to exploitation of their family or other personal relationships.

(iii) Undisclosed principal and agent transactions

Consumer advocates have concerns about the ABA's proposals to exclude from the Code products/services that are offered on an undisclosed principal/agent basis. The suggestion that compliance with the clause 28 provisions in these circumstances can be 'impractical and costly' for the principal and agent does not of itself appear to be an adequate reason for exempting these transactions from the Code.

Consumer advocates note that banks often use agents because it reduces their costs. As an agent of the bank, the Code obligations flow through to the agent, and consumer advocates can see no reason why the cost of document changes to reflect the agency arrangements, or the obligations of the Code, should be a reason for exempting transactions from the Code.

The fact that the transaction is offered on an undisclosed principal basis does not seem to increase the case for the change.

Consumer advocates are not opposed to the argument that the Code should not force a principal to be disclosed. However, it is not clear that this is the effective of the current provisions. At worst, perhaps the Code requirements might effectively disclose that the principal is an institution that subscribes to the Code.

Alternative proposals

Given the concern expressed by banks that, in some circumstances, the information that the Code requires them to provide to guarantors is unnecessary, given the knowledge of the guarantor, an alternative amendment to the Code would be to revert to the original recommendation of the 2001 Review of the Banking Code. This provided that:

> The Code should require a bank to provide a prospective guarantor with all relevant information about the principal debtor and the transaction or facility to be guaranteed which:
> - is in the possession of the bank; and
> - a prospective guarantor would reasonably require in order to decide whether or not to enter the guarantee.
>
> For this purpose, information includes representations with respect to a future matter, and also includes information provided by the principal debtor to the bank and any credit reporting agency reports and other expert reports obtained by the bank. It would not include the bank's own internal opinions.[15]

A provision along these lines might allow for banks to tailor information disclosure to the needs of the prospective guarantor. Consumer advocates would support an amendment to the Code along these lines, *in preference to* the change suggested by the interim recommendation. Consumer advocates note that this recommendation was originally supported by the banking sector, although it subsequently sought further change.

Reversal of onus of proof

If the reviewer is minded to make a recommendation along the lines of the interim recommendation, consumer advocates strongly suggest that the Code also include provisions that, in the event of a dispute where the exception was relied upon, the bank should bear the onus of demonstrating that it took reasonable steps to ensure that the guarantor was a person involved in the day to day affairs of the borrower, such that the disclosure of the information was not relevant.

[15] Richard Viney, *Review of the Code of Banking Practice*, Final Report, October 2001, p 58 (recommendation 48).

Other matters

Consumer advocates also note that the guarantee provisions largely focus on disclosure. However, disclosure is not the solution to many of the problems that arise with guarantees. In addition to the disclosure requirements, the Code therefore could also usefully focus on the circumstances of the guarantor, and on providing greater protection for individuals who have become guarantors primarily for personal/family reasons.

For example, the Code could include provisions that:

- prevent a bank from instituting proceedings against a guarantor before the borrower (or at least at the same time as the borrower);
- prevent a bank from forcing the sale of a guarantor's home before it has exercised its rights on any mortgage given by the borrower, and given the guarantor the opportunity to repay the balance prior to foreclosure.

Consumer advocates recommend

12. That the interim recommendation is not adopted.

13. However, if the interim recommendation is adopted, consumer advocates recommend that the Code provide that, in the event of a dispute where the exception was relied upon, the bank bears the onus of demonstrating that it took reasonable steps to ensure that the guarantor was a person involved in the day to day affairs of the borrower, such that the disclosure of the information was not relevant

14. That the Code include provisions that:

- prevent a bank from instituting proceedings against a guarantor before the borrower (or at least at the same time as the borrower);
- prevent a bank from forcing the sale of a guarantor's home before it has exercised its rights on any mortgage given by the borrower, and given the guarantor the opportunity to repay the balance prior to foreclosure.

Protection for other parties obtaining no direct benefit from a loan

The Code should provide greater protection for co-borrowers, where any 'direct benefit' under clause 26.1 is apparent rather than real. In particular, clause 26.1 should be amended along the following lines:

> We will not accept you as a co-debtor under a credit facility where it is clear on the facts known to us, that you will not substantially receive any direct benefit under the loan.

Consumer advocates also raise concerns about situations where an individual is influenced to take out a loan in their own name, but where the benefit is taken by another person.

Additional protections are needed. One option might be for the Code to provide that, if the bank has information that a sole borrower will not substantially receive any direct benefit from the loan, the borrower would be required to get independent legal advice before proceeding.

7.5 Relationship between the CCMC and the BFSO (now FOS)

At the time of the last review, consumer advocates strongly advocated for the establishment of an independent body to monitor compliance with the Code provisions. They argued that this function was separate to that of dispute resolution, and needed to be structurally separate from dispute resolution in order for the compliance function to be effective.

Consumer advocates continue to support an independent compliance body, however, there is recognition that the current arrangements are not working as well as they might, and that there is room for clarification and improvement. This clarification and improvement does not need to be at the expense of the effectiveness of the CCMC.

Summary of issues raised by consumer advocates in consultations

When considering the structure and role of the CCMC, and the relationship between the CCMC and the FOS, there were a number of issues or concerns raised by consumer advocates in consultation. These included concerns that:

- the CCMC be independent of the FOS and of the industry, and be able to be an effective watchdog over code compliance;
- individuals and advocates retain the right to choose to take a matter directly to the CCMC.
- the roles and functions of the CCMC and FOS are not clearly delineated; and relatedly, that the functions of dispute resolution and compliance, and the distinctions between them, are not always well understood.
- the current processes require that if a matter involves both financial compensation and a potential Code breach, a consumer or advocate must first take the matter to the FOS, and then separately refer the complaint to the CCMC once the dispute is resolved at FOS. Investigations at the CCMC and FOS cannot proceed in tandem. Relatedly, there was a concern that consumers and consumer advocates should not have to be focused on working out which is the most appropriate venue.
- that the FOS collects valuable information on Code breaches and on the market, that is relevant to an assessment of compliance, but this information is not available to the FOS.

The proposed interim recommendation addresses some of these concerns, in particular, the concerns about choice of venue and access to the market information collected by the FOS. However, as discussed below, the recommendation jeopardises the independence of the CCMC. Consumer advocates are of the view that an alternative proposal can be developed to address all of the concerns raised above. The discussion below expands on these points.

Discussion on key issues

1. There is a difference between the functions of compliance monitoring and dispute resolution, and the arrangements for monitoring and dispute resolution need to reflect this difference.

   The function of dispute resolution is to resolve individual disputes in a manner that is satisfactory to the individual parties involved. For an individual consumer, the best resolution may come about without making a determination or acknowledgement that the Code (or indeed any other regulatory instrument) has been breached. In the vast majority of cases, disputes will be resolved without the oversight or input of any third party; only 7% of matters initially referred to the BFSO are investigated. Even in those matters that are investigated by the BFSO, there is no certainty that all potential Code breaches will be identified and determined. The process of resolution can also involve the jettisoning of difficult issues in order to reach a resolution. In addition, in resolving disputes, even if a consumer is awarded financial compensation, there is no requirement for the bank concerned to acknowledge that a problem occurred; nor to implement systems to rectify the problem. In particular, the experience of consumer advocates is that banks rarely, if ever, admit a breach of the Code; they simply make a commercial decision not to pursue a matter.

   Dispute resolution is not a regulatory function. In commenting on its role, the UK Financial Services Ombudsman has noted:

   > We recognise that our briefing notes could lead to industry fears that the ombudsman is becoming a quasi-regulator. However, we have no power to issue regulatory guidance telling banks and building societies what they must do. We cannot monitor or discipline them. All we do is say how we will approach those cases which are not resolved by the bank or building society and which come to us for resolution. Many banks and building societies find this helpful in resolving complaints directly with their customers.[16]

   In contrast, compliance monitoring is more closely akin to a regulatory or disciplinary function. The Banking Code Standards Board in the UK clearly sees itself as playing a regulatory role: 'We are a consumer protection regulator …'.[17] Compliance monitoring and reporting is necessary to ensure consumer confidence in the Code, and also for the pragmatic reasons that (i) not all disputes can be considered by the FOS (eg disputes where there is no financial loss); and (ii) as noted above, Code issues will not necessarily be fully investigated in a dispute resolution process. Compliance monitoring should also involve a more proactive approach in identifying issues. (Like the courts, dispute

[16] http://www.financial-ombudsman.org.uk/publications/assessment-guide/first-annual-report/resolving-banking-related-disputes.htm.
[17] Banking Code Standards Board, Ensuring a fair deal for customers, p 2, at http://www.bankingcode.org.uk/pdfdocs/BCSB_Supplement_Sept_2007_final.pdf.

resolution schemes can only consider the issues and disputes that are bought to its attention.) Compliance monitoring should also involve a commitment to recommending changes, requiring improvements, and monitoring progress over a period of time.

As the CCMC's submission to the Code review indicates, there are already a number of matters where the BFSO has identified potential Code issues, but did not investigate those issues in the course of resolving the dispute. The fact that it has been the practice of the BFSO to not investigate alleged Code breaches where not necessary for the resolution of the dispute, highlights the difference in functions between compliance and dispute resolution.

2. Merging or blurring of these functions risks compromising their effectiveness. In particular, it would be of concern if the FOS also had effectively a role in the code monitoring function; a bank involved in negotiating a dispute settlement through the FOS is unlikely to want to have as a consideration the fact that the FOS might, separate to the dispute resolution activity, make a finding that the Code has been breached and that disciplinary sanctions should be imposed. Given the focus of the FOS on conciliation, it would be inappropriate for FOS to have any disciplinary role.

3. While dispute resolution and compliance monitoring are distinct functions, they are complementary. In addition, given that the dispute resolution body will be in a good position to identify areas of potential Code breach (through the volume of disputes that it handles), there should be appropriate exchange of information so that the compliance monitoring body has sufficient market intelligence to effectively carry out its role. On the other hand, it would not be to the benefit of consumers if there was competition between the CCMC and the FOS with respect to attracting complaints.

   There therefore needs to be a close working relationship between the bodies responsible for compliance monitoring and those responsible for dispute resolution. The relationship between the bodies, and the roles of the bodies, also needs to be clear to consumers and consumer advocates.

4. When specifically asked, consumer advocates expressed a strong view that there should remain a right for individuals and advocates to refer matters directly to the CCMC for investigation. While awareness of the CCMC is not necessarily consistent amongst consumer advocates, some have expressed a preference for referring matters directly to the CCMC rather than the BFSO (or FOS). In particular, consumer advocates noted that direct referral to the CCMC is often relevant when a new approach to a Code provision is suggested, and where an issue is identified outside the context of an individual dispute. This option should not be removed. Consumer advocates did not support any removal of this current arrangement, and were of the view that to do so would seriously undermine the credibility and effectiveness of the CCMC.

5. However, consumer advocates reflected a concern about the current process of the CCMC that, if a matter is also being considered by FOS, the CCMC can only investigate the matter if it is resubmitted to the CCMC at the conclusion of the FOS process. Consumer advocates support a direct referral from the FOS at the conclusion of its processes.

6. Consumers should be free to choose to refer a matter to the FOS or directly to the CCMC. This is the case even if a matter potentially involves compensation. However, consumers should not be at risk of unwittingly excluding a venue for their dispute. Consumer advocates particularly reflected a concern about the implications of making a choice as to appropriate venue (CCMC or FOS) that later turns out to be incorrect. Some initially suggested a one-stop shop might overcome this problem. If functionally separation remains (as is recommended), the procedures and documentation of FSO and the CCMC should make very clear the roles and limitations of the different venues, and the consequences of proceeding in one venue rather than another.

7. For consumers, the dispute resolution function is pre-eminent. It is vital that consumers have access to a free, independent and effective dispute resolution service that has a clear mandate and capacity to resolve disputes.

8. Compliance monitoring needs sufficient resources and independence to operate effectively. The body responsible for compliance monitoring should be independent of industry, and sufficiently resourced and empowered to make its own enquiries and reviews, in addition to responding to complaints.

Response to the interim recommendation that FOS play a 'triage' role

Given the above, consumer advocates have significant concerns about the interim recommendation that:

> "All alleged breaches of the Code be referred to the FOS in the first instance for determination as to whether the matter should be referred to a case manager in the FOS or the CCMC for consideration as to whether there has or has not been a breach of the Code."

If this recommendation were adopted, it would not be possible for consumer advocates and consumers to refer a matter directly to the CCMC. As noted above, this outcome is not one that was favoured by consumer advocates.

In addition, there is a suspicion amongst some that, if this recommendation were implemented, the current approach of the BFSO suggests that very few, if any, potential Code breaches would be referred to the CCMC. In its submission to the review, the CCMC noted that it had received only one referral from the BFSO in the past year (IP p 56). This is despite statistics from the BFSO showing that it identified some matters as potentially involving Code breaches, but did not make a determination on those matters.

It is also unclear from the interim recommendation what role the FOS would play in the event that a dispute does not involve financial loss. It is the understanding of consumer advocates that the question of a financial loss is a threshold issue for the various EDR schemes, such that there is no consideration of the substantive issues in the complaint unless a financial loss is identified. Giving the FOS a role in determining whether an alleged Code breach should be referred to the CCMC would seem to require a consideration of the substantive issues, even if the matter does not meet the threshold for FOS involvement.

In addition, the suggestion that the CCMC only be empowered to investigate matters referred to it by the FOS does not sit well with the proposal that the CCMC retain an ability to investigate issues on its own motion.

Finally, the interim recommendation provides no indication of the circumstances in which it would be appropriate to refer the matter to the CCMC or to the FOS case manager. The ABA recommends that the FOS have jurisdiction to refer matters with no financial loss to the CCMC. However, it should be open for a consumer to choose to refer a matter to the CCMC *even if* there is financial loss involved.

Given the concerns raised above about the distinction in roles of dispute resolution and compliance monitoring, it would be clearly inappropriate for the FOS to have complete discretion in these decisions. At the very least, if any such jurisdiction is given to the FOS, there should be a requirement for independent auditing of the way in which the FOS has carried out this function.

Consumer advocates note that in the last review, all stakeholders supported the concept of an independent CCMC. While consumer advocates acknowledge that there are aspects of the current arrangements that are not working, they are not convinced that reducing the independence of the CCMC is the best solution.

Other compliance monitoring bodies

Reference is made in the IP to the Code Compliance Committee established to monitor compliance with the Insurance Code of Practice. The Insurance Code Compliance Committee is established within the IOS, and the IP notes that:

> … technically the Code Compliance Committee can act independently but in practice it has acted in reviewing the work of the Ombudsman's services (IP p 58)

With respect, this description does not give consumer advocates great confidence that the incorporation of the CCMC into the FOS will result in more effective and independent compliance outcomes.

It is also noted that there seems to be a considerable lack of transparency in relation to the Insurance Code Compliance Committee and its functions and decisions:

- There is no separate website for the Committee;
- there appears to be no reference to the Committee on the IOS website or the Code of Practice website;

- the consumer brochure on the insurance code simply notes, under the heading Who monitors the industry and the Code?, the following: The Insurance Ombudsman Service (IOS) independently and impartially resolves general insurance disputes, between insurers and participating companies. The IOS makes sure each company signed up to the Code meets the required standards. If a company does not, it can be required to take action to fix the problem and sanctions may be imposed.[18]
- Except in the organisational chart, there is no reference to the Committee in the 2006/2007 Annual review of the IOS. (In contrast, the 2005/2006 annual review includes a report from the CCC Chair.)

On the other hand, there appears to be greater identification and referral of Code issues by IOS staff than is the case for the BFSO. For example, the 2006/2007 Annual review notes that ten of eleven matters were referred t the Code Secretariat by IOS staff, and one by a decision maker. In insurance, there appears to be more effective linking between the data collected by the dispute resolution service and the monitoring body. However, it is not necessarily the case that this more effective sharing of information between the dispute resolution body and the compliance body can only occur if both functions are located within the same organisation.

Another compliance monitoring body to compare is the Banking Code Standards Board in the UK. This operates completely independently of the UK Financial Ombudsman Service, and of the industry, and there is a statement of the roles and responsibilities of the UK FOS and the BCSB.[19] As far as can be ascertained from the publicly available material, there does not seem to be any difficulties with this model of separate bodies for compliance monitoring and dispute resolution.

Risk of differing interpretations

One of the concerns with the current arrangements appears to be that there is a risk of the CCMC and the FOS coming to different interpretations of the Code.

It is true that under the current arrangements, the FOS and the CCMC may come to different conclusions as to whether particular conduct breaches the Code. In a sense, this is not significantly different to the risk that the FOS and a Court or Tribunal might come to different conclusions about whether a particular matter breaches the law, or a provision of a contract. Perhaps the only difference is that, unlike with Court decisions, there is not a formal mechanism to feed back CCMC decisions into the FOS processes.

However, to the extent that this is considered to be a significant risk, there are a number of possible responses that do not require the merging of the functions of compliance monitoring and dispute resolution.

First, if there is appropriate communication and consultation between the CCMC and the FOS, this risk can be adequately managed. It is understood that there is already consultation

[18] See http://www.codeofpractice.com.au/Portals/0/ICA%20-%20Code%20Brochure.pdf
[19] See http://www.bankingcode.org.uk/pdfdocs/1429_001.pdf.

between the CCMC and the BFSO on the content of relevant Bulletins and other guidance on interpreting the Code.

Second, an alternative approach would be to require that determinations of a Code breach should be made by only one of the FOS or the CCMC, with the other body being obliged to 'live with' that decision. Giving an exclusive power to determine Code breaches to one body would also reduce the potential for the delays that can occur where, for example, the CCMC cannot consider a Code breach before the dispute is resolved by the FOS. It was noted that the likelihood of a dispute being referred back to the CCMC some months after initial referral was low.

If this approach is taken, the next question is whether that body should be the FOS or the CCMC.

Giving this responsibility to the FOS could potentially lead to some savings in administration. In addition, consumer awareness of the FOS is likely to be always higher than that of the CCMC (and this is appropriate), so giving FOS the central determinative role would increase the likelihood that Code issues will be identified.

However, as noted above, many consumer advocates were concerned that, with the FOS's focus on resolving disputes, there may be many potential Code breaches that are not investigated by the FOS. Requiring the FOS to make a determination on a Code breach when that is not necessary to a resolution of the dispute, or when in fact the FOS has no jurisdiction to investigate the dispute (because there has been no financial loss), seems to be a significant and unwarranted distortion of the dispute resolution function.

As noted in the IP, consumer advocates believe that, if one agency is to have sole responsibility for determining whether a bank has breached the Code, it should be the CCMC (rather than the FOS).

However, consumer advocates also recognise that implementing such an approach may have an impact on the timing and efficiency of the resolution of disputes, in that a CCMC investigation as to whether the Code had been breached or not would need to precede the substance of the FOS investigation. There is also a potential duplication from the bank's point of view, as relevant documents will need to be provided to both the CCMC and the FOS, as well as (presumably) separate written responses/explanations to each body. Given these complications and complexities, consumer advocates are not convinced that this approach (of delineating a single decision maker on Code breaches) is actually necessary at this stage.

Instead, it is suggested that a variation on the current approach would best achieve the twin objectives of efficient and accessible dispute resolution, and effective compliance monitoring that is independent of both FOS and Code subscribers. To the extent that there are concerns about a duplication of decision making on Code breaches between the FOS and the CCMC, consumer advocates believe that it can be minimised through good communication between the FOS and the CCMC. In these circumstances, consumer advocates believe that the Code should specify the following principles:

- any person or organisation can refer a matter to the CCMC for investigation;
- if FOS identifies a Code issues, and finds that there has been a Code breach, it must refer the breach to the CCMC once dispute is resolved, with the CCMC having authority to undertake further monitoring and/or consider sanctions as appropriate;
- if FOS identifies a Code issue, but finds that there is no breach, the CCMC cannot investigate the matter; however, the FOS should provide to the CCMC a summary of the matter and reasons for finding no breach;
- if FOS identifies a potential Code issue; but does not investigate this aspect of the complaint, the FOS must refer issue to CCMC;
- if consumer raises concerns about bank conduct, but there is no financial loss, the FOS must advise the consumer of the right to take the matter to the CCMC;
- if a consumer specifically asks for a dispute, once resolved, to be referred to the CCMC, the FOS must make such a referral, even if the FOS has not identified or determined a Code issue.

This approach would also have the advantage of giving consumer advocates and consumers confidence that matters can be referred to FOS for resolution of the dispute, and that Code issues can be subsequently considered by the CCMC *without the need for a further complaint to the CCMC* by the financial counsellor or consumer. As noted above, the requirement to make a further complaint to the CCMC once the FOS dispute is resolved was a key concern for consumer advocates.

The issue of customer consent to referrals from FOS to the CCMC is noted, however, this could be addressed by:

- referring the matter without details of the disputant (where possible); or
- in the response letter to the disputant, advising that the FOS intends to refer the matter to the CCMC unless the disputant notifies the FOS that he or she does not want the matter to be referred; or
- adding referrals to the CCMC in the existing bundled privacy consent.

Consumer advocates also note that the BFSO has suggested that 'by agreeing to subscribe to the Code, banks would agree to the exchange of information between FOS and the CCMC in relation to cases'. (IP p 57)

If, however, the reviewer is of the view that only one body should make determinations on Code breaches, consumer advocates would support changes to the Code and to the FOS terms of reference to make it clear that it is the CCMC that plays this role.

Communication and referrals between the FOS and the CCMC

As noted above, there is a strong level of concern among consumer advocates that there is not:

- sufficient level of clarity about the respective roles of the CCMC and the FOS;
- sufficient sharing of information about potential Code breaches between the CCMC and the FOS.

The CCMC needs market intelligence in order to perform its role effectively. Given its volume of work, the FOS is a significant potential source of market intelligence for the CCMC. We have noted above the ways in which we believe that the FOS should refer matters to the CCMC for information, further action/monitoring, and/or investigation. These and other matters should be set out in a Memorandum of Understanding or similar document between the CCMC and the FOS.

The CCMC and the FOS should also work together to develop common statements about their respective roles, for the use in publications, websites, and other communications to consumers and their advocates. In addition, FOS staff should receive training on the compliance role, and on the identification of matters that might be appropriately referred to the CCMC.

In addition, to highlight the distinction between compliance monitoring and dispute resolution, there should be a separate heading in the Code for these two areas.

Response to interim recommendations on CCMC functions and governance

The interim recommendation suggests an expanded list of functions for the CCMC.

Consumer advocates strongly support the explicit inclusion of the following CCMC functions in the Code:

- Conduct its own enquiries into banks' compliance with the Code;
- Prepare an annual report on compliance with the Code;
- Contribute to joint publications between the CCMC and FOS on Code issues; and
- Promote awareness of the Code with banks through the provision of feedback on emerging Code issues.

However, in relation to the last dot point above, consumer advocates query why this should be limited to feedback on 'emerging Code issues'.

Given the comments above in relation to the relationship between the CCMC and the FOS, consumer advocates do not support the inclusion in the Code of the interim recommendation to the extent that it:

- limits CCMC to monitoring compliance through referrals, reports and data received from the FOS;
- limits the CCMC to making determinations only on matters that are referred to the CCMC by FOS;
- limits the CCMC's enquiries into systemic issues that are identified by FOS and the CCMC.

Consumer advocates reiterate that any person or organisation should be able to refer a matter directly to the CCMC, and the Code should continue to make this very clear.

Consumer advocates support the inclusion of a reference to the principles of natural justice in the governance documents for the CCMC.

However, consumer advocates strongly reject the suggestion from the ABA that the CCMC should be required to balance the impact of its decisions on subscribing banks against the benefits to consumers. Individual banks make a decision on cost-benefit equation of the Code at the time of subscribing to the Code. Banks should not subsequently be able to argue before the CCMC that compliance is too costly, or does not provide sufficient consumer benefits. If this is the case, it should be a matter to be raised in Code reviews. The role of the CCMC should be to determine whether there a bank has breached the Code, and if so, whether a sanction should be imposed, and what action is needed to ensure that the breach is rectified and to prevent recurrence.

Consumer advocates are also of the view that the governance arrangements for the CCMC should make it absolutely clear that the CCMC is independent of the subscribing banks, and of FOS.

Response to interim recommendation on sanctions

Consumer advocates are concerned that the CCMC does not have a sufficient array of sanctions to support its role, and strongly support the interim recommendation that the range of sanctions available to the CCMC be broadened.

Response to interim recommendation on CCMC composition

Consumer note that the interim recommendation suggests some changes to the composition of the CCMC. With the exception of a change to replace BFSO with FOS in clause 34(a), it is not clear why these changes have been suggested. Consumer advocates would object strongly to any changes to the composition that would remove the references to the relevant experience/knowledge of the CCMC members.

Consumer advocates assume that the reference in the interim recommendation to the CCMC consumer representative being appointed by 'the consumer representative on the FOS Board', is a typographical error, and that the reference should be to an appointment by all consumer representatives on the FOS Board.

Consumer advocates recommend

15. That the CCMC and the FOS should remain functionally separate bodies.

16. That the CCMCA Constitution (and/or other governing documents) and the Code make it clear that individuals and organisations have the right to make complaints about Code breaches directly to the CCMC.

17. That the Code make it clear that the CCMC retains its powers to conduct investigations in response to complaints from any person or organisation, and also to initiate investigations

and reviews on its own initiative, and to make determinations in relation to those investigations.

18. That the Code also spell out functions of the CCMC as including:

- Conduct its own enquiries into banks' compliance with the Code;
- Prepare an annual report on compliance with the Code;
- Contribute to joint publications between the CCMC and FOS on Code issues; and
- Promote awareness of the Code with banks through the provision of feedback on Code issues.

19. That the Code, the CCMC governing documents, and the FOS terms of reference make it clear that the following arrangements apply in matters that are referred to the FOS:

- if FOS identifies a Code issues, and finds that there has been a Code breach, it must refer the breach to the CCMC once dispute is resolved, with the CCMC having authority to undertake further monitoring and/or consider sanctions as appropriate;

- if FOS identifies a Code issue, but finds that there is no breach, the CCMC cannot investigate the matter; however, the FOS should provide to the CCMC a summary of the matter and reasons for finding no breach;

- if FOS identifies a potential Code issue; but does not investigate this aspect of the complaint, the FOS must refer issue to CCMC;

- if consumer raises concerns about bank conduct, but there is no financial loss, the FOS must advise the consumer of the right to take the matter to the CCMC.

- if a consumer specifically asks for a dispute, once resolved, to be referred to the CCMC, the FOS must make such a referral, even if the FOS has not identified or determined a Code issue.

20. That any changes to the CCMCA Constitution (and/or other governing documents) that are needed to ensure that the CCMC is, and is seen to be, independent of the industry and of FOS, are made.

21. That the governing documents for the CCMC incorporate principles of procedural fairness.

22. That the Code and governing documents provide that the sanctions that can be imposed by the CCMC include warnings, rectification, and compliance audits.

23. That the CCMC and FOS agree on a MOU to reflect the above and their respective roles.

24. That the CCMC and FOS prepare a common statement setting out the roles and responsibilities of the two bodies, and the relationship between them.

25. That staff at the FOS be trained on the compliance role and on the identification of matters that might be appropriately referred to the CCMC.

26. That the provisions relating to dispute resolution (internal and external) and compliance monitoring be set out under separate headings in the Code.

7.6 Equity release products

Equity release products are still relatively new, and are of particular relevance to older consumers. Consumer advocates strongly support the work that has been done by Sequal to clarify and apply a no negative equity guarantee. The Sequal Code is a good starting point for consumer protection in relation to these products, but it suffers from a lack of enforceability. Incorporating a commitment to compliance with the Sequal Code is therefore an important change, and will give further support and relevance to the Sequal Code.

Consumer advocates are also of the view that the Code should require some disclosure of risk in relation to equity release products. These products are not covered by the Corporations Act requirements for a Product Disclosure Statement that includes a discussion of risk, and the Consumer Credit Code disclosure requirements do not cover the issue of risk.

Consumer advocates recommend

27. That a new clause be introduced in the Code to govern equity release products. This clause should:

- commit subscribing banks and their agents to compliance with the Sequal Code; and
- in the pre-contractual stage, require banks to disclose information about the risk of the product. The relevant provisions in the Corporations Act could be used as a model for this requirement.

7.7 Fees and charges

This is an area where consumer advocates believe the Code could do more, particularly given the recent discussions about penalty fees. In particular, consumer advocates note the very harsh impacts that penalty fees can have for consumers on low incomes. As the reviewer would be aware, Choice and Consumer Action Law Centre have implemented a very public campaign on penalty fees, and it is understood that they will be providing a detailed submission on this issue to the review. This submission, therefore, will not discuss the issues around fees and charges in any detail, but makes the following points in response to the interim recommendations.

Consumer advocates are supportive of the interim recommendation to the extent that it amends the definition of fees and charges to include reference to the reasonable recovery of costs. However, to make this change effective, there needs to be a commitment that penalty fees will not exceed reasonable costs. The Code should therefore include a new provision along the lines of:

- We will impose only those fees and charges that
- We have disclosed to you in accordance with Part A
- Are reasonably necessary
- Represent a reasonable recovery of costs incurred when customers default on repayments, exceed their overdraft limit, or are overdrawn on their account'

The provision should also cover the following penalty fees: credit card late payment and overlimit fees, account overdrawn or dishonour fees, direct debit dishonor fees or ATM failed transaction fees.

In addition, the following principles should be introduced in the Code:

- The Code should require banks to give consumers a warning that, if a particular transaction goes ahead, a fee will be imposed.
- Banks own fees and charges should not trigger a further fee.
- Fees that are unfair should not be imposed, as a minimum, inward dishonour fees should not imposed.

Consumer advocates note that, where consumers are negotiating hardship arrangements with banks, they can continue to be charged default and other fees. In these circumstances, it could be argued that the bank is contributing to a person's hardship. Consumer advocates believe that the Code should provide that, where a person is in hardship discussions with the bank, additional fees will not be charged.

Consumer advocates recommend

28. That the Code include a new provision along the following lines:

29. We will impose only those fees and charges that

- We have disclosed to you in accordance with Part A
- Are reasonably necessary
- Represent a reasonable recovery of costs incurred when customers default on repayments, exceed their overdraft limit, or are overdrawn on their account'

The provision should also cover the following penalty fees: credit card late payment and overlimit fees, account overdrawn or dishonour fees, direct debit dishonor fees or ATM failed transaction fees.

30. In addition, the Code should:

- Require banks to give consumers a warning that, if a particular transaction goes ahead, a fee will be imposed.

- Include a commitment that the imposition of a banks' own fees and charges should not trigger a further fee.

- Include a commitment that inward dishonour fees will not be imposed.

- Include a commitment that further default fees will not be imposed once a consumer has commenced hardship discussions with the bank.

7.8 Direct debits

Consumer advocates report continued problems with direct debits, despite the Code provision. Consumer advocates report that their clients often find it very difficult for to cancel a direct debit, because branch staff refuse to accept the instructions. In fact, consumer advocates report that, when they advise their clients to cancel a direct debit at branch level, the feedback from the consumer is that bank staff appear to have no knowledge of the Code provision, and refer consumers back to the merchant.

This is largely an issue of staff training and Code compliance, which is discussed generally later in this response. However, given the concerns about compliance with this clause in particular, consumer advocates also suggest that it might be worth considering building into the Code an incentive for compliance. For example, the Code could provide that if a bank does not initially accept a direct debit cancellation request, it will reimburse any penalty fees that are imposed as a result of the debit overdrawing the consumer's account, where those fees would not have been incurred had the cancellation been initially acted upon.

The Code should also be amended to make it clear that:

- an instruction to cancel a direct debit can be made by telephone;
- an instruction to cancel a direct debit must be acted upon immediately by the bank.

Consumer advocates recommend

31. The Code provide that if a bank does not initially accept a direct debit cancellation request, it will automatically reimburse any penalty fees that are imposed as a result of the debit overdrawing the consumer's account, where those fees would not have been incurred had the cancellation acted upon at the time that the customer first made the request to the bank.

32. The Code be amended to make it clear that:

- an instruction to cancel a direct debit can be made by telephone; and
- an instruction to cancel a direct debit must be acted upon immediately by the bank

7.9 Account switching

Consumer advocates support the interim recommendations on account switching, however, are of the view that the Code can, and should, go further. Consumer advocates are of the view that the key principles announced by the ABA will only go a small way towards reducing the barriers to switching. In particular, consumer advocates note that the principles do not guarantee that the new financial institution will notify merchants, and that, in order to reduce the risk of penalty fees, consumers will still need to keep two accounts open for an extensive period of time.

Consumer advocates believe that the interim recommendations could be strengthened by:

- including timeframes;
- including a commitment to reverse penalty fees incurred during the switching process;
- requiring banks to provide clear information to consumers about the switching process.

Consumer advocates recommend

33. That the Code provision on account switching:

- include specific timeframes (eg 48 hours) for at least the obligations to: provide a list of direct debit and credit arrangements; and notifying debit users of new direct debit and direct credit arrangements;

- include a commitment to reverse penalty fees incurred during the switching process; and

- require banks to provide clear information to consumers about the switching process

7.10 Electronic banking

Consumer advocates note the importance of the EFT Code, and its current provisions in relation to liability for disputed transactions.

Consumer advocates support the interim recommendation in relation to simplification of clause 33. Consumer advocates, however, would be concerned if the review recommends that the right to be notified when information is available electronically is removed.

Consumer advocates note that clause 39.3 already provides a statement that the Code will be read subject to the EFT Code in the event of inconsistency.

7.11 Communication

As noted above, consumer advocates have raised a number of concerns about communication by banks, both in the context of hardship discussions and more generally. While they welcome the interim recommendation that the Code include in the general principles 'a commitment to communicate in a timely and courteous manner', they also suggest that some more specific benchmarks need to be included. For example, the Code could specify that communications are at least acknowledged in writing within a specified time frame, and that agreements made by telephone are confirmed in writing within a specified time frame.

Consumer advocates recommend

34. That the Code:

- include 'a commitment to communicate in a timely and courteous manner' be included in the general principles of the Code;

- specify standard timeframes for responding to communications from consumers;

- include a requirement that agreements made by telephone are confirmed in writing within a specified timeframe.

7.12 Account suitability

Consumer advocates support the intent of the current clause 14, but are of the view that more needs to be done to draw the attention of relevant consumers to the existence of basic bank accounts. In particular, the current clause is limited because it does not require any proactivity on the part of banks, and consequently, bank staff are not always proactively advising of the existence of basic bank accounts.

Consumer advocates refer to the more proactive stance in the UK Banking Code:

Before you become a customer, we will:

- assess whether your needs are suited to a basic bank account (if we have one) and offer you this product if they are; and

- offer you a basic bank account if you ask and meet the conditions for one.

They suggest that a similar clause be introduced in this Code.

Consumer advocates strongly support the interim recommendation that clause 14 include reference to indigenous customers.

However, consumer advocates do not support the removal of the last sentence in clause 14: 'We will also do this [provide details of suitable accounts] if you ask for this information or if, in the course of dealing personally with you, we become aware that you are in receipt of Centrelink or like benefits.'

To the extent that the banks are concerned that the current wording might place the bank at regulatory risk, consumer advocates note that providing information about accounts is not providing advice. However, in order to forestall any concerns, an alternative might be to replace the last sentence with a separate subclause along the following lines:

> We will give you information on accounts that might be suitable for low income earners, or disadvantaged people if you ask for this information, or if in the course of dealing personally with you, we become aware that you are in receipt of Centrelink or like benefits.

Consumer advocates recommend

35. That the Code include a clause along the lines of clause 3.1 in the UK Banking Code.

36. That clause 14 of the Code include reference to indigenous customers.

37. That the last sentence of clause 14 be deleted, and a new subclause included along the following lines:

> We will give you information on accounts that might be suitable for low income earners, or disadvantaged people if you ask for this information, or if in the course of dealing personally with you, we become aware that you are in receipt of Centrelink or like benefits.

7.13 Key commitments – Continuous improvement

The commitment to continuous improvement in the Code is an important one, particularly at the time of Code reviews. Consumer advocates strongly support this principle remaining in the Code, and note that the Code should support an intention that customer service standards always get better.

7.14 Key commitments – Disclosure

Consumer advocates support the interim recommendation that clause 10 be simplified to clarify and eliminate any overlap between Code provisions. However, in implementing this recommendation, the focus should be on unnecessary overlap.

7.15 Key commitments – Acting fairly and reasonably

Consumer advocates note that the CCMC has asked the question whether a breach of clause 2.2 can be found in the absence of any other breach of the Code. It is our understanding that rather than being a 'cover clause' 2.2 has been found to have independent meaning and invites a broader reflection on whether the communications between banks and their customers have been fair and reasonable having regard to all of the circumstances.

Notwithstanding, the relationship between the key commitments and the rest of the Code is not entirely clear, and consumer advocates believe that it would benefit from some clarity.

As a general principle, consumer advocates would support clarification that would confirm the existence of consumers' rights under the key commitments that are independent of the remaining provisions of the Code. Consumer advocates note that the draft Abacus Code provides the following to clarify the relationship between the key promises and the remainder of the Code:

> This Part of the Code contains general principles or values applying to our members and customers, as well as the broader community. Where they overlap, these principles should be interpreted by reference to the more specific and details commitments of Part D – Delivering on our Promises.

However, consumer advocates support a clause in the Banking Code that makes it clear that consumers have independent rights under clause 2.2.

Consumer advocates recommend

38. That the Code contain a provision explaining the relationship between the key commitments and the rest of the Code, and clarifying that consumers have independent rights under clause 2.2.

7.16 Compliance with the laws

Consumer advocates do not support the removal of clause 3.1 from the Code. Consumer advocates note that the wording of this clause was specifically offered by the ABA in the last review of the Code. It provides an important contractual right with respect to other laws.

Consumer advocates agree that many consumer disputes will be considered by the FOS, however, there will still be some consumer disputes that are excluded from the FOS (for example, by the monetary limit). In addition, an additional may wish to take a matter through the Court system, rather than through the FOS. The suggestion from the ABA clause 3.1 is unnecessary because most disputes will be heard by the FOS is therefore not supported by consumer advocates.

To the extent that the CCMC is uncomfortable about banks referring to it breaches of the law, this could be addressed by clarifying in the functions of the CCMC that clause 3.1 does not require banks to report to the CCMC on breaches of the law that are not also breaches of the Code provisions.

Consumer advocates recommend

39. That clause 3.1 be retained.

40. That the Code make it clear that the functions of the CCMC do not extend to monitoring and investigation alleged breaches of clause 3.1 unless they are also breaches of other provisions in the Code.

7.17 Terms and conditions

Consumer advocates have no specific comments on the issues raised by the ABA, but agree that the Code provisions on terms and conditions should be consistent with the requirements of the Corporations Act.

7.18 Copies of documents

Consumer advocates do not object to the interim recommendation that clause 11 be amended to make it consistent with the 7 year statutory requirement for provisions of documents.

7.19 Opening of accounts

Consumer advocates agree with the interim recommendations that:

- Clause 16 be amended to include reference to AML/CTF legislation; and

- Clause 16(a) should include reference to information tailored to identifications issues faced by remote indigenous communities.

In relation to the second point, consumer advocates note the work that has been done in the superannuation industry in relation to account opening, and suggest that it would be relevant here.

7.19 Changes to terms and conditions

Consumer advocates are concerned that the interim recommendation could result in banks unilaterally choosing to send required information electronically, rather than in writing. The recommendation should be clarified to ensure that information is only provided electronically where the customer makes specific informed consent to such provision.

Consumer advocates recommend

41. That the Code clarify that the information referred to in clause 18 can only be provided electronically after a consumer makes specific informed consent to such provision.

7.20 Chargebacks

Consumer advocates are concerned that the interim recommendation could result in banks unilaterally choosing to provide the information on chargebacks electronically, rather than with statements. Again, the recommendation should be clarified to ensure that information is only provided electronically where the customer makes specific informed consent to such provision.

Consumer advocates note that some banks have chosen to introduce in their terms and conditions timeframes for reporting problem transactions, where those timeframes are significantly shorter than the timeframes set by the Mastercard/Visa chargeback arrangements. For example, while the Mastercard/Visa arrangements allow chargebacks within 90 days, some banks require consumers to notify disputes within 30 days. This timeframe is unreasonably short. The Code should specify a minimum timeframe for reporting of chargebacks, perhaps by reference to the relevant Mastercard/Visa rules.

Consumer advocates recommend

42. That the Code clarify that the information referred to in clause 20 can only be provided electronically after a consumer makes specific informed consent to such provision.

43. That the Code make it clear that, under clause 20(a), a card subscriber will not set a timeframe for reporting unauthorised transactions that is more than 7 days less than the timeframe set by Visa/Mastercard for the relevant transaction.

7.21 Privacy and confidentiality

Consumer advocates support the interim recommendation that any changes to Clause 22 be considered in the context of the report by the Australian Law Reform Commission into privacy legislation, and welcome the opportunity to have specific comment on this issue once the report is released.

Given this, consumer advocates have not included specific recommendations in relation to privacy in this submission. However, as a general principle, consumer advocates suggest that the Code should:

- endorse the application of the Privacy Principles in the various Privacy Acts (Federal and State/Territory);
- recognise the importance of the 'personal information security' obligations explicit in the privacy principles;
- recommend consideration of increased controls on the re-use of data collected for one purpose for other unrelated purposes (including information obtained through loan application and capacity to pay assessments);
- oblige subscribing banks to ensure that compliance with the Code privacy provisions is incorporated into contracts with any third parties that might deal with the personal information of consumers.

7.22 Statements of account

Consumer advocates agree with the interim recommendation that clause 24 be aligned with the EFT Code provisions when finalised.

7.23 Advertising

Consumer advocates support the interim recommendation that clause 30 be retained.

7.24 Internal and external dispute resolution

Consumer advocates note that, while the banks have made great strides in internal dispute resolution, there are still problems with the scale of IDR capacity and responses to meet expectations. However, many of these problems will be minimised if the Code were to include more specific requirements around communication, as discussed above.

Consumer advocates also note that the Code provisions around IDR need to refer to the more recent international standard in this area, and agree with the interim recommendation on this point. Consumer advocates also note that it can sometimes be difficulty to access IDR, and that there should be appropriate pathways within banks to ensure that complaints are identified as complaints, and referred to the IDR process. This issue should be addressed in training.

Consumer advocates suggest that the Code needs to clarify that access to the IDR processes is free to the consumer, even where the bank has engaged solicitors. Consumer advocates report that in these cases, the banks sometimes pass the solicitors' costs on to the consumer.

Consumer advocates recommend

44. That the Code make it clear that access to IDR procedures is free to the consumer, even if the bank has engaged solicitors or other third parties.

Related to the Code, consumer advocates strongly support the terms of reference of the FOS being expanded to allow the FOS to consider hardship applications. This may be an issue that should be pursued separately to this Code review.

7.25 Applications and transitional

Consumer advocates note that these provisions will need to be updated once the revisions to the Code are finalised.

However, consumer advocates also wish to note with concern the long delays that accompanied the sign-up on banks to the revised Code following the 2001 review. A similar response to this review would be very disappointing.

Consumer advocates are also strongly of the view that subscribing banks cannot sign up to the Code with conditions – they must agree to comply with the Code in its entirely to be entitled to be considered a Code subscriber. The Code should make this very clear.

45. Consumer advocates recommend

That the Code make it clear that subscription to the Code cannot be accompanied by any conditions on the applicability of particular provisions in the Code.

7.26 Definitions

Consumer advocates do not have any specific comments on the definition issues raised by the ABA.

7.27 Indigenous communities

Consumer advocates strongly support the interim recommendation that the Code include reference to the Indigenous Commitment Statement and incorporate principles in relation to the provisions of appropriate banking services to Indigenous communities, particularly those in remote locations.

Consumer advocates also suggest that these principles include reference to the implications of income management arrangements on credit assessment and other matters.

7.28 Code drafting issues

Consumer advocates note that the language of the Code is sometimes more complex or technical than is needed. They suggest that the draft Abacus Code provides a model for a more accessible style of drafting. Consumer advocates therefore support the interim recommendations that:

- the language of the revised Code be simplified and less formal; and
- the structure of the Code be amended to link related topics more closely together in the Code.

In reviewing the language and structure of the Code, consideration could also be given to the appropriate use of illustrations and examples.

However, any simplification in the language should not result in a reduction of the consumer protection standards in the Code.

Consumer advocates note the recommendation in relation to a 'principles based reference', but are unclear as to the practical import of this recommendation. In particular, consumer advocates are concerned that any move towards a more principles-based approach does not have the effect of eliminating the specific detail and benchmarks that are required for an effective Code that is contractually binding. In this context, it is noted that a principles-based

approach is likely to still require the development of extensive guidance for industry.[20] The risk is, however, that this guidance will be developed in a less transparent manner, without the robustness that should occur when specific details are considered in the context of an independent review.

As noted above, consumer advocates believe that in some areas where the 2004 Code introduced a new principle, without much in the way of specifics, the usefulness of the principle in casework has been mixed, and in some cases, has been of less effect than was originally anticipated. It may be that the introduction of a concept as a 'principle' provides a mechanism for introducing a new concept at a high level into the Code, paving the way for more specific details to be incorporated into the Code over the subsequent reviews of the Code. In the context of an environment of continuous improvement, this might be a useful approach for new and/or controversial issues. However, a more widespread adoption of a principles-based approach in the Code, is likely to reduce the effectiveness and enforceability of the Code, and is not supported by consumer advocates.

8. Other matters

8.1 Level of compliance

While consumer advocates are generally of the view that there a commitment to Code compliance by Code subscribers, there are some areas where it appears that straightforward requirements in the Code are not matched by high levels of awareness and implementation by branch staff. As noted above, these include the provisions on:

- cancelling direct debits (one advocate noted that she often gave clients a copy of the Banking Code provisions to show to branch staff in order to get action);
- informing of basic bank accounts;
- implementing effective hardship policies and processes.

It is also suggested that staff awareness of the existence of the Code can be low, despite the fact that the branch concerned may have copies of the Code on display. A CCMC shadow shopping survey of Code accessibility in branches found the following:

1. Code on display 61 branches
2. Code not on display but available on request 30 branches
3. Code not available 12 branches

The CCMC noted:

[20] Julia Black, *Principles based regulation: Risks, challenges and opportunities,* presentation in the University of Sydney, Department of Business Law seminar series, March 2007, pp 14-15, at http://www.econ.usyd.edu.au/content.php/18133.html.

> This last group largely consisted of branches where staff were simply unfamiliar with the Code. At these branches, the Committee Members were offered product disclosure statements, copies of internal bank documents and even a copy of the 1993 Code of Banking Practice. These branches were spread across six different banks.[21]

This highlights the need for both continuing, appropriate, staff training, and strong compliance mechanisms. In particular, staff training on Code issues should not be isolated to specific training on the Code. Instead, training on relevant provisions of the Code should be incorporated into other training, if not already done so. This will help to make the link between the Code provisions and day-to-day decisions and operations within a bank. For example, training on bank responsibilities under clause 25.1 should be incorporated into the general training on credit assessment. Training on responsibilities under clause 14 should be incorporated into sales and advice training for tellers and sales staff. Training on responsibilities in relation to customers in hardship should be incorporated into basic training for tellers, call centre and collections staff.

Consumer advocates recommend

46. That clause 7(b) be amended to require training to ensure that staff have adequate knowledge of the provisions of the Code and of its practical application in banking transactions, and are able to appropriately refer consumers to the IDR or hardship processes where relevant.

8.2 Unfair contract terms

Consumer advocates note that the Victorian Unfair Terms legislation currently applies to deposit and transaction products, and is soon to apply to consumer credit products. Progress on implementing nationally uniform legislation on unfair terms has been slow, but the recent Productivity Commission inquiry into the consumer policy framework has recommended that unfair terms legislation be introduced nationally.

Consumer advocates also note that the draft Abacus Code includes a commitment to:

- Terms that strike a fair balance between the customer's legitimate needs and interests, and the credit union's interests and obligations (cl 4.2); and
- Not including terms that consumers are unlikely to be able to comply with (cl 4.3).

At a minimum, consumer advocates are of the view that the Code should include a similar clause.

[21] Code Compliance Monitoring Committee, Bulletin, 4 August 2006.

Consumer advocates recommend

47. That the Code include a clause along the lines of clauses 4.2 and 4.3 of the draft Abacus Code.

8.3 Account combination

Consumer advocates remain concerned at the impact that account combination has on consumers in financial difficulty. They suggest that account combination is going to increase in the current climate, with the result that consumers in default may lose access to all funds in their account without warning. Consumer advocates suggest that notification of account combination after the event is of limited assistance to consumers, and instead suggest that the Code include more specific provisions to protect consumers from the harsh impacts of account combination.

In particular, the Code should prohibit banks from exercising their right to combine accounts in circumstances where a consumer is not in default, or where a consumer, although in default, is negotiating a hardship response, or is complying with an alternative repayment arrangement.

Consumer advocates recommend

48. That the Code prohibit banks from exercising their right to combine accounts in circumstances where a consumer is not in default, or if in default, is negotiating a hardship response, or is complying with an alternative repayment arrangement.

8.4 Small business

Coverage of small business was introduced in the 2003/2004 Code. Consumer advocates in general welcome the applicability of the Code to small businesses, but have no specific comments on the issues facing small business, and the extent to which the proposed amendments would impact on small business.

8.5 Use of finance and mortgage brokers

Although specific national finance broking legislation is progressing, consumer advocates believe that the Code could usefully provide that banks will only use brokers that are members of an ASIC-approved EDR scheme.

Consumer advocates recommend

49. That the Code provide that banks will only use finance and mortgage brokers that are members of an ASIC-approved EDR scheme.

8.6 Promotion of the Code

As noted earlier in this submission, consumer advocates are concerned at the lack of consumer awareness of the Code and their rights under the Code. Promotion of the Code is a responsibility of the ABA. However, consumer awareness could be increased by:

- Amending clause 9(a) to require banks to 'prominently' display the Code; and
- Introducing an obligation to provide a reference to the Code on, or with, statements, at least once every 12 months.

Consumer advocates recommend

50. That clause 9(a) is amended to refer to 'prominently display'.

51. That the Code includes an obligation to provide a reference to the Code on, or with, statements, at least once every 12 months.

Appendix A

Consultation Documents for General Invitation to Comment

PARTICIPANT INFORMATION for QUT RESEARCH PROJECT

Consumer submission to the Review of the Banking Code

Research Team Contacts
Nicola Howell, Associate Lecturer 07 3138 2006 nicola.howell@qut.edu.au

Description

This project is funded by the Consumer Advisory Panel of the Australian Securities and Investments Commission (ASIC). The funding body will not have access to the data obtained during the project.

The purpose of this project is to write a report which will:

1. analyse, from the perspective of consumer advocates, the effectiveness of the current Code of Banking Practice,
2. identify any potential areas for improving the Code, including by reference to self-regulatory arrangements in other sectors or other jurisdictions, and
3. assess the merits of the interim recommendations set out in the Review Issues Paper.

The research team requests your assistance because, as a consumer advocate, you may have information that is relevant to an assessment of the effectiveness of the Banking Code.

Participation

Your participation in this project is voluntary. If you do agree to participate, you can withdraw from participation at any time during the project without comment or penalty. Your decision to participate will in no way impact upon your current or future relationship with QUT or with ASIC.

You can participate in this project by

(i) completing a brief written questionnaire (10-15 mins) on the effectiveness of the Code of Banking Practice and the interim recommendations proposed in the review Issues Paper;

(ii) contacting the researcher directly, by telephone or email, to discuss your views on the Code and/or interim recommendations;

(iii) providing the researcher with anonymous case studies, statistics or other information to support your concerns or suggestions for change (any case studies provided must be written so that it is not possible to identify the consumer concerned; and the consumer's consent to distributing the case study to the researcher must be obtained before submitting the case study to the researcher); and/or

(iv) providing comments on a draft submission, to be circulated (via the Consumers Federation of Australia) in early-mid July 2008.

Expected benefits

It is expected that this project will benefit you and other consumer advocates, as it will ensure that a coordinated, detailed consumer submission is made to the review process. The project will also benefit the Code reviewer, and ultimately, if changes recommended by the submission are adopted, will benefit consumers of banking services.

Risks

There are some potential risks associated with your participation in this project, including:

- the risk that you could disagree with the conclusions of the report/submission and/or feel that your particular recommendations or suggestions have not been included in the report.;
- the risk that you could be identified as a participant in the research due to the public knowledge of your advocacy role;
- if you provide case studies, that the inclusion of the case studies in the report will enable the subjects of the case study to be identified.

However, these risks will be managed or minimised through the following steps:

- a copy of the draft report will be circulated to participants for their comments
- the draft and final report will not name individual research participants
- there will be no compulsion for research participants or their organisations to endorse the report
- the report will only name specific organisations as being involved in the project where the organisation consents to being named
- the researcher will only accept case studies for use in the project where it is not possible to identify the consumer concerned, and the consuemr advocate providing the case study confirms that client consent for the study to be used in a public submission has been obtained
- written material provided for the project (including questionnaire responses and case studies), and contact details of research participants will be stored in a locked filing cabinet in the researcher's office at QUT
- electronic material provided for the project will be stored in the researcher's email or secure computer drive, and will be password protected.

In addition, QUT provides for limited free counselling for research participants of QUT projects, who may experience some distress as a result of their participation in the research. Should you wish to access this service please contact the Clinic Receptionist of the QUT Psychology Clinic on 07 3138 4578. Please indicate to the receptionist that you are a research participant.

Confidentiality

All comments and responses will be treated confidentially. The names of individual research participants will not be disclosed in the draft or final research report, or in any other public document arising from the research. However, organisations that endorse the report, and consent to being named, may be identified in the report.

Consent to Participate

We would like to ask you to sign a written consent form (attached) to confirm your agreement to participate in this research.

Questions / further information about the project

Please contact the researcher team member named above to have any questions answered or if you require further information about the project.

Concerns / complaints regarding the conduct of the project

QUT is committed to researcher integrity and the ethical conduct of research projects. However, if you do have any concerns or complaints about the ethical conduct of the project you may contact the QUT Research Ethics Officer on 07 3138 2340 or ethicscontact@qut.edu.au. The Research Ethics Officer is not connected with the research project and can facilitate a resolution to your concern in an impartial manner.

CONSENT FORM for QUT RESEARCH PROJECT

Consumer submission to the review of the Banking Code

Statement of consent

By signing below, you are indicating that you:

- have read and understood the information document regarding this project
- have had any questions answered to your satisfaction
- understand that if you have any additional questions you can contact the research team
- understand that you are free to withdraw at any time, without comment or penalty
- understand that you can contact the Research Ethics Officer on 07 3138 2340 or ethicscontact@qut.edu.au if you have concerns about the ethical conduct of the project
- agree to participate in the project

Name _____

Signature _____

Date _____ / _____ / _____

Please return signed consent form to Nicola Howell:

Email scanned copy to: nicola.howell@qut.edu.au
Mail to: School of Law, Queensland University of Technology, Gardens Point campus, GPO Box 2434, Brisbane Qld 4001

QUT RESEARCH PROJECT

Consumer submission to the review of the Code of Banking Practice

Questionnaire for consumer advocates

This questionnaire is seeking a summary of your views on the Code of Banking Practice and the interim recommendations for changes to the Code. Your responses will be used to inform the development of a detailed consumer submission to the review of the Code of Banking Practice.

This research has been funded by the Consumer Advisory Panel of the Australian Securities and Investments Commission. The researcher is Nicola Howell, Associate Lecturer in the School of Law, Queensland University of Technology.

1. To what extent has the Code of Banking Practice been relevant in your casework and/or policy advocacy?

2. Are there provisions in the Code of Banking Practice that work well? Which provisions?

3. Are there provisions in the Code of Banking Practice that are inadequate? Which provisions? Are there any improvements you can suggest?

4. Are there areas/issues that are currently not covered by the Code of Banking Practice, but could usefully be included? Which issues? How should they be addressed?

5. Are the Banking Code provisions on dispute resolution and code compliance adequate? If not, what changes would you suggest?

6. Do you have any comments on the interim recommendations set out in the Issues Paper? If so, which recommendations do you support, or not support, and why?

7. Do you have any other comments on the effectiveness of the Code of Banking Practice?

Name: _____

Position: _____

Organisation: _____

Contact no or email: _____

(if the researcher needs to seek clarification)

Please also complete and return the Consent Form included in the 'Participant Information for QUT Research Project' document.

Please note that your participation in this research will be confidential, and individual participants will not be named in the report/submission or other public documents.

If you would like to provide additional information, or have any questions about the research, please contact Nicola Howell (nicola.howell@qut.edu.au, tel 07 3138 2006).

Appendix B

Consultation documents for detailed interviews/discussions

PARTICIPANT INFORMATION for QUT RESEARCH PROJECT

Consumer submission to the Review of the Banking Code

Research Team Contacts

Nicola Howell, Associate Lecturer
Tel 07 3138 2006
nicola.howell@qut.edu.au

Description

This project is funded by the Consumer Advisory Panel of the Australian Securities and Investments Commission (ASIC). The funding body will not have access to the data obtained during the project.

The purpose of this project is to write a report which will:

4. analyse, from the perspective of consumer advocates, the effectiveness of the current Code of Banking Practice,
5. identify any potential areas for improving the Code, including by reference to self-regulatory arrangements in other sectors or other jurisdictions, and
6. assess the merits of the interim recommendations set out in the Review Issues Paper.

The research team requests your assistance because, as a consumer advocate, you may have information that is relevant to an assessment of the effectiveness of the Banking Code.

Participation

Your participation in this project is voluntary. If you do agree to participate, you can withdraw from participation at any time during the project without comment or penalty. Your decision to participate will in no way impact upon your current or future relationship with QUT or with ASIC.

Your participation will involve an informal discussion with the researcher about the effectiveness of the Code of Banking Practice and the interim recommendations proposed in the review Issues Paper. Subject to the number of issues that you wish to discuss, this is expected to take ½ - 1 hour of your time.

In addition, you can participate further by:

(v) completing a brief written questionnaire (10-15 mins) on the effectiveness of the Code of Banking Practice and the interim recommendations proposed in the review Issues Paper;

(vi) providing the researcher with anonymous case studies, statistics or other information to support your concerns or suggestions for change (any case studies provided must be written so that it is not possible to identify the consumer concerned; and the consumer's consent to distributing the case study to the researcher must be obtained before submitting the case study to the researcher); and/or

(vii) providing written or verbal comments on a draft submission, to be circulated (via the Consumers Federation of Australia) in early-mid July 2008.

Expected benefits

It is expected that this project will benefit you and other consumer advocates, as it will ensure that a coordinated, detailed consumer submission is made to the review process. The project will also benefit the Code reviewer, and ultimately, if changes recommended by the submission are adopted, will benefit consumers of banking services.

Risks

There are some potential risks associated with your participation in this project, including:

- the risk that you could disagree with the conclusions of the report/submission and/or feel that your particular recommendations or suggestions have not been included in the report.;
- the risk that you could be identified as a participant in the research due to the public knowledge of your advocacy role;
- if you provide case studies, that the inclusion of the case studies in the report will enable the subjects of the case study to be identified.

However, these risks will be managed or minimised through the following steps:

- a copy of the draft report will be circulated to participants for their comments
- the draft and final report will not name individual research participants
- there will be no compulsion for research participants or their organisations to endorse the report
- the report will only name specific organisations as being involved in the project where the organisation consents to being named
- the researcher will only accept case studies for use in the project where it is not possible to identify the cosnumer concerned; and the consuemr advocate providing the case study confirms that client consent for the study to be used in a public submission has been obtained
- written material provided for the project (including questionnaire responses and case studies), and contact details of research participants will be stored in a locked filing cabinet in the researcher's office at QUT
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In addition, QUT provides for limited free counselling for research participants of QUT projects, who may experience some distress as a result of their participation in the research. Should you wish to access this service please contact the Clinic Receptionist of the QUT Psychology Clinic on 07 3138 4578. Please indicate to the receptionist that you are a research participant.

Confidentiality

All comments and responses will be treated confidentially. The names of individual research participants will not be disclosed in the draft or final research report, or in any other public document arising from the research. However, organisations that endorse the report, and consent to being named, may be identified in the report.

Consent to Participate

Due to the nature of the project a verbal consent mechanism will be used. Prior to commencing the discussion, the researcher will ask you to confirm that you:

- have read and understood the participant information document regarding this project
- have had any questions answered to your satisfaction
- understand that if you have any additional questions you can contact the research team
- understand that you are free to withdraw at any time, without comment or penalty
- understand that you can contact the Research Ethics Officer on 07 3138 2340 or ethicscontact@qut.edu.au if you have concerns about the ethical conduct of the project
- agree to participate in the project

The researcher will make a note of your verbal consent to participate.

Questions / further information about the project

Please contact the researcher team members named above to have any questions answered or if you require further information about the project.

Concerns / complaints regarding the conduct of the project

QUT is committed to researcher integrity and the ethical conduct of research projects. However, if you do have any concerns or complaints about the ethical conduct of the project you may contact the QUT Research Ethics Officer on 07 3138 2340 or ethicscontact@qut.edu.au. The Research Ethics Officer is not connected with the research project and can facilitate a resolution to your concern in an impartial manner.

QUT RESEARCH PROJECT

Consumer submission to the review of the Code of Banking Practice

Discussion guide for interviews with consumer advocates

The points below form a discussion guide for the interviews with consumer advocates. Interviews will normally be conducted by telephone, and the questions asked during the interview will be based on the issues set out below. However, there will also be scope for the interviewee to focus on a subset of the issues below, and/or to provide additional information.

Scope of issues to be covered:

- The effectiveness of the Banking Code generally.
- The specific use of the individual Code provisions in casework, and any problems identified.
- The merits of the interim recommendations in the Issues Paper.
- The effectiveness of dispute resolution and code compliance provisions, and the relationship between the Banking & Financial Services Ombudsman and the Code Compliance Monitoring Committee.
- Issues that are not covered by the Code, but that should be included, including issues/provisions currently in other self-regulatory instruments (Australian or another jurisdiction).
- The level of compliance with the Code.
- The membership of the Code, and strategies for increasing its membership.
- The scope and effectiveness of the Banking Consumer Consultative Committee established by the Code.
- Publicity and consumer awareness of the Code.
- The language / style of the Code, and suggestions for improvement.
- The extent to which the Code is or should be consistent with other regulatory and self-regulatory requirements.
- The merits of adopting a principles-based (rather than rules based) approach to the Code.
- Suggestions for other changes to the Banking Code.